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In the Supreme Court of the United States

OCTOBER TERM, 1957

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Maryland is reported at 151 F. Supp. 258, and is attached hereto as Appendix A. The final judgment of the District Court, dated May 22, 1957, is attached hereto as Appendix B. The decisions of the Interstate Commerce Commission dated February 5, 1954, and October 1, 1956, are reported at 291 I. C. C. 527 and 299 I. C. C. 195, respectively.

JURISDICTION

This action was brought under 28 U. S. C. 1336 to set aside and enjoin an order of the Interstate Commerce Commission. The decree of the district court was entered on May 22, 1957, and the Commission filed its notice of appeal in that court on July 19, 1957. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States* v. *Pennsylvania Railroad Company,* 323 U. S. 612; *United States* v. *Great Northern Railroad Company,* 343 U. S. 562; *Virginian Railway v. United States,* 272 U. S. 658; *Ayrshire Corporation* v. *United States,* 335 U. S. 573; *New York* v. *United States,* 331 U. S. 284.

STATUTES INVOLVED

The statutes involved, the National Transportation Policy, and 49 U. S. C. 3 (1) and 15 (7), are set forth in Appendix C attached.

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the district court erred in setting aside that portion of the order of the Commission which found just and reasonable reduced rates initiated by the rail carriers for application on imported iron ore from the port of New York to the Youngstown area, which reduced rates were published to equalize the rates of the rail carriers

serving the port of New York with the rates of the rail carriers serving the ports of Baltimore and Philadelphia to the same destination area.

2. Whether the district court erred in holding that the order of the Commission insofar as it approved the tariff schedules of The Pennsylvania Railroad Company on iron ore from Philadelphia, filed to become effective February 9, 1953, is not supported by essential basic findings, and in remanding the proceeding to the Commission to make more explicit findings and for further proceedings consistent with the opinion of the district court.

3. Whether the district court erred in holding that the findings and the record before the Commission do not support the Commission's action in approving the carrier-initiated rates from New York and Philadelphia, and in holding that since Baltimore is nearer to differential territory than New York and Philadelphia, it had a "natural advantage" which had to be reflected in lower rates from Baltimore than from the other two ports, and that the freedom of rail carriers to initiate competitive rates must yield to a long-established differential rate relationship which the court found had been voluntarily maintained by the same carriers.

4. Whether the district court erred in substituting its judgment for that of the Commission in evaluation of the evidence presented before the Commission, and in substituting its views as to

rate policy for the judgment of the Commission; and whether the district court erred in its interpretation and application to this case of the provisions of the National Transportation Policy (49 U. S. C. preceding section 1), particularly with respect to national defense, and of sections 1 (5), 3 (1), 15 (1), 15 (7), and 15a (2) of the Interstate Commerce Act (49 U. S. C. 1 (5), 3 (1), 15 (1), 15 (7), and 15a (2)).

5. Whether the district court erred in holding that the Commission could not approve carrier-initiated rates from New York, which rates were the same as the rates from Baltimore, even though the Commission had found that such rates from New York would further the national defense.

STATEMENT

This action was brought by the Baltimore and Ohio Railroad Company, the Western Maryland Railroad Company (hereinafter sometimes referred to as the Baltimore railroads), the Canton Railroad Company, and the municipal authorities and certain commercial interests of Baltimore, Maryland, to set aside certain parts of an order dated October 1, 1956, and two reports dated February 5, 1954 (291 I. C. C. 527) and October 1, 1956 (299 I. C. C. 195), in which the Commission found that certain reduced rail rates on imported iron ore were just and reasonable, and that other such rates were unjust and unreasonable.

The complaint attacks the Commission's determination that:

(1) The reduced rates proposed by the Pennsylvania Railroad from Philadelphia to some 17 points in the Wheeling, Youngstown, and Steubenville areas are just and reasonable. These rates, which became effective on February 19, 1954 (originally scheduled to become effective on February 9, 1953), have the effect of giving Philadelphia parity with Baltimore on rail shipments of imported iron ore to the points in question.

(2) The reduced rates proposed by the New York Central and the Erie Railroad from the New York port area to the Youngstown area are just and reasonable. These rates which have never become effective (originally scheduled to become effective February 9, 1953) would give to New York rate parity with Baltimore and Philadelphia to the Youngstown area.

(3) The 20-cent reduction per gross ton proposed by the Baltimore and Ohio and the Western Maryland railroads from Baltimore to the Wheeling, Youngstown, and Steubenville areas, and also to Johnstown and Pittsburgh (originally scheduled to become effective February 16, 1953) is not shown to be just and reasonable. If these rates had become effective, they would have given Baltimore a 20-cent differential below Philadelphia to these points[1] provided the Pennsylvania

[1] For over 50 years Baltimore and Philadelphia have had parity to Johnstown and Pittsburgh.

had not matched these rates by a further reduction, which it promptly did.

The plaintiffs do not attack the Commission's decision that the proposed reduced rates from Boston to the Youngstown area (originally scheduled to become effective February 9, 1953, and October 21, 1954) are noncompensatory and are not shown to be just and reasonable.[2] These rates would have given Boston parity with Baltimore, Philadelphia, and New York to the Youngstown area.

The district court vacated the Commission's order of October 1, 1956, insofar as it approved the reduced rates from New York; remanded to the Commission for more explicit findings that portion of the order which approved the reduced rates from Philadelphia which became effective on February 19, 1954; and affirmed that portion of the order which disapproved the proposed reduced rates from Baltimore filed to become effective on February 16, 1953, and from Philadelphia filed to become effective on February 16, 1953,

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[2] That portion of the order disapproving the proposed reduced rates from Boston, however, was the subject of a suit in the United States District Court in Boston, entitled *Boston and Maine Railroad, et al.* v. *United States, et al.*, Civil Action No. 56–928–A, in which that court in a decision dated June 27, 1957, sustained the Commission's findings that the proposed reduced rates from Boston are noncompensatory and are not shown to be just and reasonable. No appeal has been taken in that case.

and March 11, 1953. (Appendix A, infra, pp. 1a–45a; Appendix B, infra, pp. 46a–48a).

As a result of voluntary action among the railroads, there has been for a number of years a differential adjustment of rates on import and export traffic between the North Atlantic ports and so-called differential territory. For a delineation of this area, see 291 I. C. C. 527, 530, footnote 3. It appears that these differentials largely grew out of the fact that at one time ocean rates favored the more northern ports and the railroads decided by agreement among themselves to offset these ocean rate differentials by rail differentials so as to enable the various ports to compete for foreign trade on equal terms. The background of these differentials is considered in *Maritime Asso., Boston Cham. of Com.* v. *Ann Arbor R. Co.*, 95 I. C. C. 539 (1925) and 126 I. C. C. 199 (1927); *In the Matter of Differential Rates*, 11 I. C. C. 13 (1905). The Commission noted in the *Maritime Asso.* case, *supra*, (p. 567) that the port differentials are arbitrary and were " 'the result of compromise, arbitration, and agreement resorted to as the only means so far found of averting rate wars.' They do not accurately reflect transportation conditions * * *."

Under these differentials, the rates on imported iron ore from Baltimore to differential territory, other than to the Pittsburgh area where there was parity with Philadelphia, were below Philadel-

phia, New York, and Boston. Actually, these were in large part paper rates because until after World War II very little iron ore moved to differential territory from the North Atlantic ports, as the principal source of iron ore was the Mesabi Range. The preponderance of such iron ore as was imported was consumed in furnaces at or near the eastern seaboard, although some iron ore did move to Johnstown and Pittsburgh, to both of which areas Baltimore and Philadelphia were on rate parity. With the diminishing of the iron ore in the Mesabi Range, efforts were made to develop sources outside of the United States in order to supply the ever growing demand of the steel mills, and iron ore began to be imported in ever increasing quantities from foreign sources.

In 1949, the steel producers complained that the rates on import iron ore did not reflect the increased volume of shipments, and asked for reduced rates. After a study of the rate structure, on October 9, 1950, the Baltimore & Ohio, Western Maryland, Pennsylvania, and connecting lines established reduced rates from Baltimore to steel mills in the Johnstown, Pittsburgh, Wheeling, Youngstown, and Steubenville areas, and the Pennsylvania established rates from Philadelphia, Morrisville, and Fairless to the Johnstown and Pittsburgh areas on the same basis as those established from Baltimore, thus maintaining parity between Baltimore and Philadelphia to those areas.

Subsequent to this October 9, 1950, rate revision, the steel mills west of Pittsburgh in the Wheeling, Youngstown, and Steubenville areas asked the Pennsylvania to reduce the rates from Philadelphia to their mills to the level of the rates in effect from Baltimore, and thus accord them the same flexibility in the use of ports as that enjoyed by their competitors in the Johnstown and Pittsburgh areas. Thereupon, the Pennsylvania filed in 1953 proposed reduced rates which were followed by the other rate actions previously mentioned. The Commission suspended all of the proposed rates and instituted an investigation under Section 15 (7) of the Interstate Commerce Act.

Following the hearings, the Commission, by Division 2, on February 5, 1954, held that the proposed rates of the Pennsylvania, which would give Philadelphia parity with Baltimore to the Wheeling, Youngstown, and Steubenville areas, are just and reasonable, but that all the other proposed rates had not been shown to be just and reasonable. Commissioner Arpaia dissented from the majority opinion to the extent that it denied the ports of New York and Boston equality of rates with the ports of Baltimore and Philadelphia. On February 19, 1954, the Pennsylvania Railroad put the rates that had been approved by the Division into effect.

Upon petition of various parties in the case, the Commission reopened the proceeding on July

30, 1954, for further hearing. In its decision of October 1, 1956, the Commission adopted the findings of Division 2, except to the extent that the latter had held that the New York Central and the Erie had failed to show that their proposed rates from New York to the Youngstown area had not been shown to be just and reasonable. Commissioner Arpaia, in a dissenting opinion, reiterated his previous statement that the rates through the Boston port should be equalized with those through the Baltimore, Philadelphia and New York ports. Commissioner Freas, in a dissenting opinion, in which Commissioners Mitchell, Murphy and Minor joined, disagreed with the majority opinion insofar as it approved parity rates through the New York port. Commissioner McPherson did not participate.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The necessity of having several ports available for the unloading and inland movement of iron ore which has a prior movement by water has long been recognized. In *Iron Ore Rate Cases*, 41 I. C. C. 181, 215, the Commission observed that a blast furnace must be operated continuously, requiring an adequate supply of ore at all times. Therefore, it is essential that the steel mills have routes and equal rates from several ports to avoid congestion, to hold layovers in port to a minimum, and to assure continuous operation of the mills. This case involves the general question as

to the extent to which railroads serving New York and Philadelphia may establish rates on imported iron ore to points in so-called differential territory on a parity with the rail rates from Baltimore to such points, and thereby encourage the construction and use of ore-unloading facilities at New York and Philadelphia. The growing volume of iron ore imports makes the issue commercially important to the ports and railroads involved. The Commission's conclusion, ignored by the court below, that the establishment of rates which would encourage the construction of such facilities at several north Atlantic ports, would be in the interests of national defense and consistent with the National Transportation Policy, emphasizes the importance of the questions presented by the appeal.

The district court took the position that the Commission had prescribed parity rates on import iron ore from the ports of Baltimore, Philadelphia and New York to the points in question (Appendix A, infra, p. 1a); that Baltimore has a "natural" rail advantage since it is nearer to differential territory than Philadelphia and New York (Appendix A, infra, p. 35a); that Baltimore is at a disadvantage with respect to water transportation since most of the import iron ore involved here will come from Labrador [3] and Balti-

[3] The iron ore involved in this action moves not only from Labrador, but also from several South American countries, Sweden and Cuba.

more is further from Labrador than either New York or Philadephia (Appendix A, infra, p. 40a); that the relation of the rates to the distances over which iron ore is transported from the Atlantic ports to differential territory has to be considered since Section 3 forbids a carrier to give any undue or unreasonable preference to any port or to subject any port to any undue or unreasonable prejudice (Appendix A, infra, p. 35a); and that in upholding parity of rates from Baltimore, Philadelphia and New York, notwithstanding differences in distance from Labrador, the Commission in effect had approved a lower rate from Philadelphia and New York than from Baltimore (Appendix A, infra, p. 34a). The court concluded that the Commission's findings were inadequate to support its determination that there should be parity of rates between the ports, notwithstanding the disparity in the rail distances.

The court held that the admitted fact that the rates on imported iron ore from Baltimore and Philadelphia to Pittsburgh and Johnstown are on a parity in spite of differences in distance, did not support the Commission's determination since the differential rates to "differential territory" had existed for a long time and was the basis on which the port of Baltimore had built its iron ore unloading facilities. With respect to the findings that the differences in distance were insignificant so far as Philadelphia and Baltimore were concerned, the court held that the Commission erred

in using the Pennsylvania Railroad's operating distances[4] from these two ports as the criterion for determining the validity of the Pennsylvania new rates from Philadelphia instead of using either the short-line distances[5] or the tariff distances.[6] The court concluded that the principal basis "for the Commission's decision was its finding that parity of rates * * * was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system." However, the court concluded that the findings of the Commission did not support the Commission's view that there had to be rail rate parity between Baltimore and Philadelphia in order for the latter to participate in the traffic. The court also held that the Commission failed to assess the evidence as to whether the relative cost of ocean transportation would offset the lesser rate from Baltimore, and that the findings were inconclusive as to what extent differences in distance by sea will influence the movement of ore. The court further

[4] The *operating* distance is the distance of the actual route over which the traffic moves. In other words, it is the distance of the route which the railroad actually uses in transporting the traffic.

[5] The *short-line* distance of the shortest physical route over which the traffic may be moved between two points without transfer of lading. This route may not be listed in the tariffs and there may be no published rates for it.

[6] The *tariff* distance is the shortest distance between the points in question over routes published in the tariffs.

held that there was similarly a lack of substantial basis for the conclusion of the Commission upholding the New York rates.

While the court found the proposed New York rates invalid and ordered their cancellation, it did not order the cancellation of the Philadelphia rates, which give that port parity with Baltimore. With respect to the Philadelphia rates, the court said that they could be kept in effect pending the remand of the case to the Commission to make explicit findings as to the relative costs of ocean shipping of import iron ore to the ports of Baltimore and Philadelphia and as to the traffic to be reasonably expected at these ports if parity is continued or if the differential is restored. The court upheld that part of the Commission's order which found that the railroads serving Baltimore had not shown that their proposed reduction in rates to keep the 20 cents differential with Philadelphia was just and reasonable, and no appeal has been taken from that portion of the decision.

The court erred in several respects in reaching its decision in this case.

1. It is submitted that the Commission was justified in finding that the Pennsylvania Railroad had shown that its reduced rates from Philadelphia, which would have the effect of giving that port parity with Baltimore, would be just and reasonable. *Ayrshire Corporation* v. *United States*, 335 U. S. 658. There was no question but that these rates were compensatory and within

the zone of reasonableness. While there was a difference in distance, the Commission found that the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore. Further, it is submitted that the Commission did not err in not requiring the Pennsylvania to base its rates from Baltimore and Philadelphia on a distance scale. Similarly, the Commission was not required to disallow the Pennsylvania rates because the rates do not attempt to equalize the total transportation costs, ocean and rail, from Labrador to differential territory. The fact that the railroads have attempted to equalize total costs through the North Atlantic ports for a number of years does not make it mandatory for them to continue to attempt to equalize such costs. See *New York C. R. Co.* v. *United States*, 99 F. Supp. 394, 398, affirmed 342 U. S. 890.

2. The court's decision is inconsistent insofar as it recognizes the lawfulness of the rate parity from Philadelphia and Baltimore to Pittsburgh which is in differential territory but sets aside the Commission's finding that rate parity from Philadelphia and Baltimore to other points of differential territory is lawful. The court attempts to justify its action in this respect on the ground that when Philadelphia undertook the construction of its iron ore loading facilities, it had parity of rates with Baltimore to Pittsburgh and this parity had existed for a number of years even though iron ore did not move under

such rates until recent years. It is submitted that such purely historical considerations do not justify the court's action in setting aside carrier-initiated rates, and lead to an anomalous result. Thus, the distance from Pittsburgh to Youngstown is greater over the Baltimore and Ohio Railroad (76 miles) than over the Pennsylvania Railroad (66 miles). Yet, while the same rate applies both from Baltimore and Philadelphia to Pittsburgh, the rate over the Pennsylvania from Philadelphia to Youngstown through Pittsburgh would be greater under the differential than the rate from Baltimore to Youngstown through Pittsburgh.

3. The Commission's explicit findings justified it in upholding the Pennsylvania Railroad's reduced rates from Philadelphia to points in differential territory. For example, the Commission found that the service over the Pennsylvania Railroad is substantially identical from both Philadelphia and Baltimore, and it is submitted that this is a rational test for the Commission to use in determining whether a railroad is discriminating against a port. The fact remains, and it is not questioned, that the actual operating distance, that is the actual route of movement, over the Pennsylvania Railroad from Baltimore and from Philadelphia to differential territory is substantially the same, the Pennsylvania's operating route from Philadelphia to Youngstown being only 11 miles greater than its operating

route from Baltimore. The court, however, states that this standard of comparison is erroneous and holds that the Commission should have used not the route of actual travel, but the theoretical short-line distances or the tariff route distances between these ports and differential territory.

4. The court erred in discounting the Commission's conclusion that in the interests of national defense the various carriers should be permitted to establish compensatory rates which would encourage the erection of ore unloading facilities at several North Atlantic ports. National defense, of course, was only one of the factors relied upon by the Commission in reaching its conclusion that the proposed rates from New York and Philadelphia were shown to be just and reasonable. The Commission found that it was in the interest of national defense that iron ore be routed through several North Atlantic ports. The court held, however, that the record does not sustain the finding that there must be parity between Baltimore and Philadelphia for the latter to share in the traffic. Even assuming that this is true, it ignores the fact that the record establishes that no iron ore unloading facility will be built at New York unless there is parity of rates, and that, as a practical matter, iron ore cannot move through a port which does not have modern unloading facilities. The court itself found that "It was, however, made clear by all the witnesses that facilities [at New York] would not be estab-

lished without assurances of parity of rates." (Appendix A, infra, p. 29a); "Without parity of rates with Philadelphia and Baltimore no facility is planned at either [Boston or New York] location." (Appendix A, infra, p. 18a); and "Adequate unloading facilities are essential to the delivery of iron ore at a point of entry." (Appendix A, infra, p. 17a).

The Act places upon the Commission a specific obligation to apply the National Transportation Policy, including "developing * * * a national transportation system * * * adequate to meet the needs * * * of the national defense." If the findings and the record provide a rational basis for the Commission's judgment as to "which program will best promote the public interest in accordance with the National Transportation Policy" then this determination must stand. See *U. S.* v. *Pierce Auto Lines,* 327 U. S. 512, 515, 535 and *U. S.* v. *Detroit Navigation Co.,* 326 U. S. 236, 241 (1945). In the latter case this Court observed that "The Commission is the guardian of the public interest" and that "Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." From its over-all knowledge of the transportation system of the country, and particularly the facilities needed for unloading and moving iron ore,

the Commission was in a position to conclude that it would be in the interests of national defense to have more than one North Atlantic port equipped for the importation of iron ore.

5. The court was inconsistent in its determination with respect to the New York and Philadelphia rates. Its approach to the Philadelphia rates seems to be based on the proposition that Baltimore should have a favorable rail differential at least to the extent of offsetting possible higher ocean costs in shipping iron ore from Labrador to that port. Thus, it remanded the case to the Commission for that body to make explicit findings as to the relative cost of ocean shipping to the ports of Baltimore and Philadelphia, and as to the traffic to be expected at these ports if parity should be continued. However, it did not remand the issue of the lawfulness of the New York rates to the Commission but held that the New York rates were invalid. We submit that it was clearly erroneous for the court below to hold, apparently as a matter of law, that the railroads serving New York may not establish compensatory rates on the same level as the rates from Philadelphia and Baltimore and to exclude the proposed New York rates from further consideration by the Commission.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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SEPTEMBER 16, 1957.

APPENDIX A

United States District Court for the District of Maryland

Civil Action No. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

versus

THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

(Argued January 21 and 22, 1957. Decided 26 April 1957)

Before SOPER, *Circuit Judge,* CHESNUT and R. DORSEY WATKINS, *District Judges*

Opinion

SOPER, *Circuit Judge:*

This suit was brought by the Baltimore & Ohio Railroad Company, Western Maryland Railway Company, Canton Railroad Company, and certain civic authorities and commercial organizations of Baltimore, Maryland, to set aside decisions and orders of the Interstate Commerce Commission which prescribed parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia, and New York to 17 destinations in the eastern portion of the so-called differential

or Central Freight Association territory. This area lies west of a line from Buffalo, New York, to Pittsburgh, Pennsylvania, and includes Youngstown, Ohio, on the north, Wheeling, West Virginia, on the south, and other intervening steel producing points in western Pennsylvania, eastern Ohio, and northern West Virginia.[1] The defendants, in addition to the United States and the Interstate Commerce Commission, include as original or intervening defendants the Pennsylvania Railroad Company which serves the port of Baltimore as well as the ports of Philadelphia and New York; the New York Central Railroad Company and the Erie Railroad Company which serve the port of New York, the Port of New York Authority; the New York, New Haven and Hartford Railroad Company and the Boston and Maine Railroad Company which serve the Port of Boston, the Port of Boston Commission, and divers producers and fabricators of steel in the differential territory.

The decisions of the Commission which are challenged in this proceeding mark the departure from a long established practice which has kept the rates applicable to both import and export traffic to and from differential territory lower as to Baltimore than the other Atlantic ports. The differentials were first established in 1877 by

[1] Differential territory is defined in *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I. C. C. 691, 692. The seventeen points, all consuming or storage centers for iron ore, are Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowellville, Niles, Struthers, Warren, and Youngstown, Ohio; Benwood, E. Steubenville, Follansbee, Weirton, and Wheeling, W. Va.

agreement of the carriers serving the territory in order to avoid misunderstandings in respect to the geographical advantages of Baltimore, Philadelphia, and New York, as affected by rail-and-ocean transportation, so as to equalize the aggregate cost of transportation between competing points in the west and the domestic and foreign ports reached through those cities. The differentials were arbitrary in a measure since they reflected only in part the lesser distances to Baltimore and Philadelphia as compared with the distances to New York and Boston, but they were established by compromise as the only means of averting rate wars.[2] The differentials applied to all traffic eastbound and westbound, domestic and export-import, between Central territory and the north Atlantic ports. The differential on eastbound export traffic from the differential territory was 60 cents per ton less to Baltimore and 40 cents per ton less to Philadelphia than the corresponding rates to New York. On westbound import traffic the same differential applied to third or fourth class and special commodity rates. Rates to Boston were not to be less than those to New York on domestic or foreign freight. In 1880 an attempt was made to modify the agreement on the ground that changes had substantially equalized ocean freights but after arbitration by the Thurman Advisory Commission the differentials established in 1877 were reaffirmed.

While this arrangement originated in a voluntary agreement of the carriers it has been consid-

[2] See *Maritime Assn., Boston Chamber of Commerce* v. *A. A. R. R. Co.*, 95 I. C. C. 539, 567; 126 I. C. C. 199.

ered by the Commission from time to time during the past 60 years when it was brought to the Commission's attention by commercial interests in Boston, New York, Philadelphia, and Baltimore, and in each instance has been found lawful.[3]

Prior to 1930 the differential was applicable to both domestic and import-export traffic. In that year the Commission removed all domestic class rates from the scope of the differential rate structure and prescribed new scales of class rates from the several ports, based primarily on distance.[4] Under this new arrangement the longer distances from the three other ports resulted in a differential on domestic traffic to and from Baltimore, which exceeded the long established differential in its favor on import and export traffic. The domestic first-class rates to Youngstown from

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[3] For a résumé of the history of the differential, see *In the Matter of Differential Rates*, 11 I. C. C. 13 (1905); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I. C. C. 151 (1936). It was also considered under varying circumstances in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I. C. C. 612 (1898); *In the Matter of Relative Rates upon Export and Domestic Traffic in Grain and Grain Products*, 8 I. C. C. 214 (1899); *Chamber of Commerce of N. Y.* v. *N. Y. C. & H. R. R. R. Co.*, 214 I. C. C. 155 (1912); *In the Matter of Import Rates*, 24 I. C. C. 78 (1912); *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I. C. C. 691 (1929); *Lighterage Cases*, 203 I. C. C. 481 (1934); *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I. C. C. 21 (1938); *State of New Jersey* v. *Baltimore & O. R. Co.*, 24 I. C. C. 581 (1941); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I. C. C. 165 (1941); *Ex-Parte Grain from Buffalo to N. Y.*, 278 I. C. C. 31 (1950).

[4] *Eastern Case Rates Investigation*, 164 I. C. C. 314.

Baltimore were fixed at $2.01 per hundred pounds, from Philadelphia $2.16 per hundred pounds, from New York $2.31 per hundred pounds, and from Boston $2.70 per hundred pounds. Since these rates did not cover import and export traffic the railroads in 1932 published new import and export class rates. These were made the same as the new domestic rates so far as Baltimore was concerned and the standard differentials in favor of Baltimore of 20 cents a ton with respect to Philadelphia and 60 cents a ton with respect to New York and Boston were preserved. The import-export class rates from the three cities last mentioned thus became generally lower than their domestic rates.

For some reason, that is not explained, the rates on iron ore from Philadelphia to Pittsburgh have been the same as those from Baltimore to Pittsburgh since 1903. This parity, however, prior to the present controversy, has been only a paper equalization since there has been practically no movement from Philadelphia to Pittsburgh and no attempt has been made by the Baltimore railroads to set up a differential on this traffic.[5]

In 1949, in response to complaints from steel producers in the interior calling attention to the

[5] In the 7 years from 1946 to 1952, inclusive, 2,160,000 gross tons moved from Baltimore to the steel mills in Pittsburgh, and 652,500 tons from Baltimore to Johnstown. No tonnage moved from Philadelphia to Pittsburgh and only 8,333 tons, comprising one cargo, to Johnstown. During the 6 years from 1946 to 1953, inclusive, approximately 647,000 tons moved from Baltimore to the steel mills in the Youngstown area and none from Philadelphia.

increased volume of movement and other changed conditions, the carriers undertook a study of the rate structure and as a result the Baltimore & Ohio, the Western Maryland, the Pennsylvania and connecting lines established, as of October 9, 1950, reduced rates on iron ore from Baltimore to Pittsburgh and also to steel mills in differential territory to the west. The Pennsylvania made a like reduction on iron ore from Philadelphia to Johnstown and Pittsburgh. The new rates retained the regular port differential to destinations in differential territory and parity between Baltimore and Philadelphia on traffic moving to Johnstown and Pittsburgh. No action was taken at this time to establish revised rates on iron ore moving from ports other than Baltimore to differential territory, but the record of the conference of railroads shows that "it was understood the usual port differentials should be observed from the other north Atlantic ports."

In August 1951, the Pennsylvania, anticipating an increase in the volume of imported iron ore and conscious that it could not expect to share in the transportation of the commodity from Philadelphia to the interior without adequate unloading facilities at this port, announced that it would erect a modern unloading facility at Greenwich in South Philadelphia designed to cost not less than $10,000,000. It proceeded to erect such facility and had spent the greater part of this sum before publishing reduced rates on iron ore, effective February 9, 1953, to which reference will now be made. Unloading facilities were installed in Baltimore by the Canton Railroad in 1917.

It was against this background that the Interstate Commerce Commission, in the decisions now under review, gave its approval to parity of rates on iron ore moving from New York, Philadelphia, and Baltimore to Central territory, but denied parity to Boston. The case grew out of the publication by the Pennsylvania of reduced rates on iron ore, effective February 9, 1953, from Philadelphia to the 17 points in differential territory, and the simultaneous publication of like rates by the New York Central from the ports of New York and Boston, and by the Erie Railroad from New York to destinations in the Youngstown area on their lines. The effect of these publications was to reduce the rates on iron ore from Philadelphia, New York, and Boston to Youngstown to $2.71 per gross ton, the same rate which applied to Baltimore.[6] In order to meet this reduction and to preserve at least in part the historic differential, the Baltimore & Ohio and the Western Maryland then published, to be effective February 16, 1953, a reduced rate of $2.51 per ton on iron ore from Baltimore to those of the seventeen points on their lines, thus restoring a 20-cent differential in favor of Baltimore as compared with the other three ports. No attempt was made by the Baltimore railroads to restore the standard differential of 60 cents over New York and Boston.

The Baltimore & Ohio and the Western Maryland also published a reduction of 20 cents per ton, effective February 16, 1953, to Pittsburgh, Johnstown, Donora, and Monessen in order to

[6] The rates are stated without the general increase approved in Ex Parte No. 175.

establish a differential on shipments of ore to Pittsburgh in accordance with the general port differential structure and to preserve a proper rate relationship between Pittsburgh and the other named cities. The Pennsylvania countered with a rate reduction of 20 cents per ton, effective February 16, 1953, from Philadelphia and Baltimore to the four named cities, and a further reduction of 20 cents in its rates from Philadelphia and Baltimore to the 17 points in differential territory, effective March 11, 1953.

The Baltimore & Ohio, the Western Maryland, and divers Baltimore interests protested the rate reductions by the other railroads, and all of the above-mentioned reductions were suspended by the Commission pending an investigation instituted on February 6, 1953. This was followed by a hearing and oral argument, and an order of Division 2 of the Commission on February 5, 1954, which approved the reduction originally published by the Pennsylvania, effective February 9, 1953, giving Philadelphia a parity with Baltimore, but canceled the tariffs of the New York Central and the Erie equalizing rates from New York and Boston with Baltimore. Division 2 also found that the February 16, 1953, tariffs of the Baltimore & Ohio and the Western Maryland, and the March 11, 1953, tariffs of the Pennsylvania were not just and reasonable and ordered them to be canceled. The Pennsylvania then published a supplementary tariff making the equalization of rates effective February 19, 1954, whereupon the Baltimore interests filed suit in this court asking a restraining order pending reconsideration by the entire Commission. The court refused to

issue the order on the ground that the administrative process had not been completed, with the result that parity rates from Philadelphia went into effect and have since prevailed. The full Commission, on July 30, 1954, stayed its order canceling the rates from Baltimore, New York, and Boston and reopened the proceeding. Finally, on October 1, 1956, the Commission rendered its decision, finding that the February 9, 1953, rates from Philadelphia and New York were justified, but that the February 16, 1950, rates from Baltimore, the March 11, 1950, rates from Philadelphia, and the February 9, 1953, rates from Boston were not justified and ordered them canceled. In this proceeding we are concerned with the propriety of the Commission's action as to the rates from Baltimore, Philadelphia, and New York.[1]

The modification of rates on iron ore by the railroads which serve the Atlantic ports in competition with Baltimore was brought about by important changes in business conditions involving an increased demand for steel and an increase in the importations of iron ore which theretofore had contributed little to the total volume of commodities transported by the railroads from the coast to the interior. The origins of the ore that has been and will be imported through the Atlantic ports have an important bearing on the controversy. No figures are available for the years 1955, 1956, or 1957 since the record before the Commission was closed on December 21, 1954, and the case is submitted to this court on the Commission's record. An outline of the con-

[1] By a subsequent decision filed on March 19, 1957, the Commission reaffirmed its decision as to the Boston rate.

ditions prevailing prior to and after World War II and until the Commission's record was closed is set out in the following excerpt from the report of Division 2 of the Commission:

> Mines in northern Minnesota, Wisconsin, and upper Michigan have for many years been the sole or principal source of supply for the iron-ore requirements of steel mills in central and trunkline territories, the preponderance of the ore moving by rail to Lake Superior docks, thence by water to lower Lake Erie ports, and by rail beyond. Prior to the end of World War II in 1945, importation of iron ore was comparatively light and the preponderance of the ore imported was consumed in furnaces at or near the eastern seaboard. Some imported ore moved to steel mills in the Johnstown and Pittsburgh, Pa., areas but little, if any, moved to mills west thereof. A few shipments which moved to interior points were consigned to manufacturers of paint or other commodities not produced by the steel mills.
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> Since the end of World War II, steel producers have developed sources of supply for iron ore in Venezuela, Chile, Liberia, Brazil, Sweden, and Cuba, and this basic raw material of the steel industry has been imported in large volume. Mines now being developed in Labrador by the Iron Ore Company of Canada will supply large quantities of iron ore for the furnaces of five steel mills in central territory which own stock in that corporation, and to other consumers. During the 6-year period from 1936 through 1941 from approximately 2,000,000 to 2,500,000 tons of iron ore were imported annually. The import movement declined drastically during World War II,

reaching a minimum of 402,096 tons in 1943, most of which originated in Canada. Following the war, importation of iron ore increased from 1,189,300 tons in 1945 to 10,145,415 tons in 1951, the latter figure equivalent to over 4 times the prewar tonnage. In 1952, a strike occurred in the steel industry and approximately 9,760,300 tons of iron ore were imported during that year. It is estimated that within a few years 20,000,000 tons of iron ore will be imported anually, a substantial portion of which will move to furnaces in central territory. While ex-lake ore will continue to move from the Lake Erie ports in large volume, it will be replaced by imported ore to a greater extent than in the past.

The full Commission, in its report of October 1, 1956, commented upon the increase in importations of iron ore into the United States in the following excerpt from its decision:

Iron ore imported into the United States in 1948 originated in 28 foreign countries and aggregated 6,091,677 gross tons. By 1953 the tonnage had increased to 11,074,035 gross tons. The principal exporting countries in this period were Chile, Sweden, Venezuela, Brazil, Liberia, and Peru. On and between August 26 and October 6, 1954, a total of 1,511,875 gross tons of ore were shipped from 13 foreign ports to north Atlantic ports. Of this amount, 776,851 tons (51 percent) entered the Port of Baltimore, 718,809 tons (48 percent) entered the Port of Philadelphia, and 16,215 tons (1 percent) entered the Port of Boston. There was no reported entry of ore at New York during this period. Approximately one-third of this ore originated at

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Seven Islands, Labrador, from which no tonnage moved prior to 1954.

Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil, and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953; and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus, in the 8 months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation. The facilities at Sparrows Point have a capacity of 6,000,000 tons and those at Fairless have a capacity of 2,000,000 tons annually. None of the ore delivered to Sparrows Point moves to differential territory. We are concerned primarily with the importations of iron ore that are delivered to the railroads for transportation to interior points subject to the published rates.

Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation. From July 31, 1954, when these shipments began, to December of that year, 1,375,747 tons were unloaded at Baltimore and Philadelphia; and it seems certain that this was merely a beginning for, as the Commission said in its final report, the evidence leaves no

doubt that "Labrador tonnage will increase to 10,000,000 tons in 1956 and probably to a greater extent in later years." In short, importations from Labrador may be expected to constitute at least one-half of all the ore imported. The proportion of this business which will come to Baltimore and Philadelphia, respectively, is foreshadowed, although imperfectly, by what happened in the last 6 months of 1954. In that period 744,017 tons came to Baltimore and 631,730 tons to Philadelphia. The Philadelphia tonnage would have been greater and the Baltimore tonnage less by 113,210 tons but for a strike which caused a diversion to Baltimore to tonnage consigned to Philadelphia.

The effect of the abolition of the differential between Philadelphia and Baltimore, which became effective on February 19, 1954, is shown to some extent by comparison of deliveries of foreign ore from all sources to railroad piers at the two ports in 1953 and 1954. In the first year Baltimore received 1,813,512 tons of which 808,875 were delivered to the railroads for shipment to the differential territory, while Philadelphia received 1,113,917 tons, of which 687,994 tons were delivered to the railroads to be delivered. 20,561 tons to Pittsburgh, and 667,433 tons to points east of Pittsburgh—none of it going to the differential territory. In 1954, Baltimore received 1,644,294 tons and of this 1,070,457 tons went to destinations west of Pittsburgh; while in this year Philadelphia received 1,564,844 tons, of which 681,599 tons went to the differential territory.

The future movement of foreign ore to this country, especially ore from Labrador, is the all-important circumstance in this case. The Labrador deposits are owned by the Iron Ore Company of Canada, of which 27% is owned by the M. A. Hanna Coal & Ore Company and the balance by by five steel producers* owning plants west of Pittsburgh, including 12 or 13 plants in differential territory. These corporations are entitled to share in the product in proportion to their interests. The steel producers in differential territory will use their shares and the balance will be sold, for the most part, to the Bethlehem Steel Corporation. All of the ore is shipped from Seven Islands, Quebec. While some of it will move by routes not involved in this proceeding, five or six million tons will move annually through Atlantic ports to inland furnaces. The ore will be carried in ships owned or chartered by the Iron Ore Company of Canada or the participating companies; and the record shows that, in order to save transportation costs by sea, the ore will be delivered, in case of parity of railroad rates, to the nearest port equipped with efficient unloading facilities. The Commission found that the one-way ocean distances from Seven Islands to the four Atlantic ports to be: Boston, 950 miles; New York, 1,187 miles; Philadelphia, 1,320 miles; and Baltimore, 1,475 miles. If the Chesapeake & Delaware Canal were used, the excess distance to Baltimore over Philadelphia would be 26 miles, but the Commission found that the larger ore vessels cannot use

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*National Steel Co., Republic Steel Corp., Armco Steel Corp., Youngstown Sheet & Tube Co., Wheeling Steel Corp.

the canal at present and probably would not use it if the canal were deepened. The evidence shows that a 20,000-ton ore carrier with a speed of 14 knots requires 3 days less steaming time on a round-trip basis from Seven Islands to Boston, 2 days less to New York and 21 hours less to Philadelphia than to Baltimore; and that it costs $2,000 per day to operate such a ship. Abolition of the differential of 20 cents per ton in favor of Baltimore and the establishment of parity of railroad rates between Philadelphia and Baltimore would cause shippers to route Labrador ore destined for differential territory through the Port of Philadelphia.

Since the Commission's decision of October 1, 1956, took no account of any shipments subsequent to December 1954, the effect of the parity of rates between Philadelphia and Baltimore in the intervening period was not ascertained, although it might have been done before the decision was rendered. The record, however, throws some light, as we have seen, on the shipments in the limited period between February 19, 1954, when the Pennsylvania put the parity rates into effect, and December 1954. The evidence directed to this period, although necessarily meager, tends to confirm the opinion of experienced witnesses heard by the Commission, that under parity rates Labrador ore destined for differential territory will move through Philadelphia and not through Baltimore. The experience of the Canton Railroad emphasizes this conclusion. This is a shipping road with 37 miles of track in the Port of Baltimore, connecting with the Baltimore & Ohio and the Pennsylvania

by rail and the Western Maryland by float. It constructed the first unloading facilities in Baltimore in 1917, in which it has invested $5,000,000 in reliance upon the differential. It is largely dependent upon the importations of ore. In 1952, its tonnage of imported ore comprised 55% of its total of which 39% was iron ore; and in 1953, the corresponding percentages were 66% and 28%, respectively. In the first nine months of 1953, it received 499,000 tons of iron ore but in the same period in 1954 under parity this amount had diminished to 239,000 tons, a decrease of 52%.

A similar situation exists with regard to the much smaller amount of ore which is brought to this country from the Port of Monrovia in Liberia. This ore is controlled by the Republic Steel Corporation, which has furnaces in differential territory and carries the ore in its own ships. In 1952, 420,000 tons were imported and it was estimated that in 1953 the amount would be somewhat larger. Heretofore all or nearly all of this ore was delivered at the Port of Baltimore. The ocean distances (miles) from Liberia to the Atlantic ports are as follows: Boston, 3,920; New York, 3,973; Philadelphia, 4,074; and Baltimore, 4,194.

The iron ore brought in from South America and Scandinavia has little bearing on the question at issue. The Commission found that, in the first nine months of 1954, 94% of the ore which originated in Venezuela, Chile, Peru, and Sweden was consigned to the United States Steel Corporation and the Bethleheem Steel Corporation. Bethlehem received about 6,000,000 tons, none of

which moves to differential territory. It is estimated that United States Steel will receive about 7,000,000 tons annually, of which 2,000,000 tons will enter the United States through the Gulf ports and 2,000,000 tons more will be consumed at Fairless. There will be a substantial movement from the docks owned by the corporation at Fairless by rail to Pittsburgh. Facilities at Fairless permit the blending of the iron before shipment to Pittsburgh and this service will be improved, and when this is done the United States Steel Corporation will abandon its practice of importing through Baltimore the iron ore for use at Pittsburgh. The corporation is not interested in the rate from Baltimore but desires a lower rate from Fairless to Pittsburgh. Baltimore has an advantage as to distances over the other ports with respect to shipments of ore from South America, except Brazil, but a disadvantage with respect to the shipments from Scandinavia.

Adequate unloading facilities are essential to the delivery of iron ore at a point of entry. Canton Railroad, as we have seen, was the first to establish such a facility in Baltimore in 1917. The Western Maryland followed in 1930, and its facility with subsequent improvements can now handle three ships at a time. The Baltimore & Ohio pier was built in 1950 and 1951 and cost $5,000,000. The capacity of these three piers in Baltimore is 13,500,000 tons per year, based on a 15% use of specially designed ore carrier type ships, and if the use of such ships is raised to 65% the total capacity will be increased to 22,275,000 tons per year. These facilities were constructed while the differential was in effect.

In March 1954, the Pennsylvania completed the first stage of its unloading facility at a cost of $11,000,000. The capacity is from 3,000,000 to 6,000,000 tons of ore, depending on the type of ship. An enlargement, which would have increased the capacity of the facility by 50%, was ordered in 1954 and scheduled to be finished in 1955. The Pennsylvania contemplates an ultimate expansion which would enable it to treble its original capacity. It estimated that it needed 2,500,000 additional tons of ore per year to maintain its Philadelphia pier profitably. These facilities were established while there was parity of rates between Baltimore and Philadelphia on traffic moving to Pittsburgh.

Bethlehem at Sparrows Point and the United States Steel at Fairless each has its own unloading facility. The first has been in operation since 1946 and the latter since January 1953.

New York and Boston have no modern ore unloading facilities and only a very small tonnage of iron ore passes through these ports. Without parity of rates with Philadelphia and Baltimore no facility is planned at either location.

The relation of the rates to the distances for which iron ore is transported from the Atlantic ports to the differential territory is a factor necessary to be considered in this case since § 3 of the statute forbids a carrier to give any undue or unreasonable preference to any port or locality, or to subject any port or locality to any undue or unreasonable prejudice. The short line distances of the railroads from the several ports to Youngstown, Ohio, that is, the shortest physical routes over which traffic may be moved without transfer

of lading, although through rates and routes may not be published, are as follows:

To Youngstown, Ohio

From—	Short line distance	Difference in distance over Baltimore
	Miles	*Miles*
Baltimore	378	
Philadelphia	424	46
Morrisville	437	59
New York	490	112
Boston	646	268

The short tariff route distances between these points, that is to say, the shortest routes from each port over which rates on iron ore are actually published are as follows:

To Youngstown, Ohio

From—	Short tariff route (miles)	Excess over the shortest tariff route from Baltimore (W. Md.—381 miles)
Philadelphia: P. R. R	428	47
Morrisville: P. R. R	441	60
New York:		
Erie	569	188
N. Y. C	612	231
Boston:		
N. Y. C	670	289
B. & M	661	280
N. Y., N. H. & H	692	311

For reasons of convenience, the Pennsylvania moves iron ore traffic over longer and more circuitous routes from both Philadelphia and Baltimore to Youngstown. The route which it uses from Philadelphia (434 miles) is practically the same as its short tariff route therefrom (428 miles); but instead of using its short tariff route of 404 miles from Baltimore, it carries the shipments 423 miles through Perryville, Maryland. If its actual operating route from Philadelphia is

compared with its actual operating route from Baltimore, the difference in distance is only 11 miles; but if this operating route from Philadelphia is compared with the short operating route from Baltimore—that of the Western Maryland Railroad—Philadelphia's excess distance is 53 miles.

The decisions of the Commission are set forth in the report of Division 2 on February 5, 1954, 291 I. C. C. 527, and the report of the full Commission on October 1, 1956, 299 I. C. C. 195. The latter dealt principally with additional evidence adduced in the interval and seems to have adopted the report of Division 2 except that it approved the new schedules from New York to the Youngstown area which Division 2 had rejected. The reports recite in considerable detail the history of the differential, hereinbefore set out, and the contentions of the opposing sides;[9] and the find-

[9] The Commission notes the contentions of the Pennsylvania that parity between Baltimore and Philadelphia is necessary so as not to stifle the importation of iron ore through Philadelphia and so as to enable the steel producers to make proper use of the new facilities at Philadelphia; that the differential was never intended to apply to low-grade bulk material and hence parity did not constitute a departure from the former practice; that Baltimore did not object to parity with Philadelphia on traffic moving to the Pittsburgh area for 50 years and that all imported iron ore moves through Pittsburgh; that the commercial interests of Baltimore will not be injured since parity as far as the Pittsburgh area has not disrupted the general port differential adjustment and the great increase in imports of iron ore will provide ample tonnage for Baltimore's unloading facilities. On the other hand, the Commission takes cognizance of the contentions that interests serving the port of Baltimore are entitled to

ings of the Commission, which are sometimes mingled with the statement of the contentions of the parties, and the ultimate conclusions of the Commission are then set forth. They may be summarized as follows:

It is shown by a statement filed by the Pennsylvania in support of its claim to parity, which the Commission seems to have found correct, that parity of rates on iron ore applies both from Baltimore and Philadelphia to Steeltown, Pennsylvania, a steel producing point east of Pittsburgh; also from Baltimore and Philadelphia to Buffalo, although the route from Baltimore over the Baltimore and Ohio is 190 miles and that over the Western Maryland is 165 miles longer than the route from Philadelphia over the Pennsylvania. A similar comparison is made between routes from Baltimore and routes from Norfolk to steel mills in Ohio and Michigan as to which parity prevails, although the distances from Norfolk are from 25 to 192 miles longer than the distances from Baltimore. Likewise parity of rates but disparity of distances exist in rates from Lake Erie ports to steel mills in the Youngstown and

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reap the natural advantages flowing from its location; that parity would deprive Baltimore of these advantages and place the entire port differential rate structure in jeopardy by giving rise to demands for reduced rates on other imported bulk commodities; that the earnings on tonnage carried from Baltimore was substantially greater than on tonnage carried from Philadelphia to the differential territory because of the shorter distances from the former port; that parity of rates on iron ore from Baltimore and Philadelphia to Pittsburgh during the past 50 years should be disregarded because there was no movement from Philadelphia to Pittsburgh under this schedule.

Wheeling areas, as to which reference is made to the decision of the Commission in *Iron Ore Rate Cases,* 41 I. C. C. 181, in which the Commission pointed out that blast furnaces must be operated continuously and that it is of advantage to the steel producers and also to the operators of the vessels to have more than one port available. It was also shown that there is a movement of large quantities of eastbound ore from Erie and Buffalo to the steel mills at Bethlehem, Fairless, Philadelphia, and Sparrows Point under a parity rate of $2.71—notwithstanding the inequality of distances; and it was said that the earnings under the proposed rates from Philadelphia to steel mills in the Youngstown area compare favorably with the earnings under the $2.71 rate from Erie and Buffalo to eastern furnaces.

In both reports the Commission seems to have approved the contention of the Pennsylvania that there are only 11 miles difference between the transportation routes from Philadelphia and Baltimore to the differential territory and, therefore, the services from both ports are substantially identical. In its final report the Commission said:

> The Pennsylvania urges also that rates from Philadelphia the same as those from Baltimore are justified by mileage and service factors. The average tariff-route distances over the Pennsylvania to the 17 destinations in differential territory are 422 miles from Philadelphia and 398 miles from Baltimore. Based on these distances, the equalized rates yield average ton-mile revenues of 6.4 mills from Philadelphia and 6.7 mills from Baltimore. The actual

> operating route of the Pennsylvania from Philadelphia is only 11 miles greater than its actual operating route from Baltimore. In both instances, the movement is via Pittsburgh, and approximately 75 percent of either haul is over the same tracks. Thus, the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore.

This statement seems to say that, in considering difference of distance between Baltimore and Philadelphia, the comparison should be made between the Pennsylvania's direct route from Philadelphia and its unnecessarily long route from Baltimore via Perryville, rather than between the tariff route of the Pennsylvania from Baltimore and the corresponding routes of the Baltimore railroads from Baltimore.

Division 2 of the Commission had little to say about the movement of the Labrador deposits because they had not begun to move prior to February 5, 1954, when the report was filed. The Commission merely quoted an owner of stock in the Iron Ore Company of Canada as saying that five or six million tons of ore will be available for shipment in 1955 and that 10,000,000 tons are likely to be shipped in 1956. It is also pointed out that vessels of 18,000 to 28,000 tons' capacity will be used in transporting the ore to the north Atlantic ports; that a large number of railroad cars will be required; that economic necessity will require the movement to take the route from Seven Islands to the mills entailing the lowest transportation costs; and that alternate ports at equal rates are required in order to avoid con-

gestion and to give the steel mills the opportunity to select the port to be used.

In the Commission's report, reference is made to its opinion *In the Matter of Rate Differentials*, 11 I. C. C. 13, which considered the Baltimore differential in 1905. The Commission said that at that time ocean rates favored the northerly ports but now iron ore moves in both chartered vessels and vessels owned by steel companies, and since 1920 ocean rates generally have been equalized with respect to voyage charters to the north Atlantic ports, but in some circumstances there is a saving of cost in routing the ore to the port nearest point of origin and that this might be true on a time charter arrangement or for an integrated shipper. The Commission then pointed out the approximate ocean distances from various points of origin to the Atlantic ports and also set out the figures which showed the amounts of Labrador ore received at Baltimore and at Philadelphia in the period from July 31 to December 5, 1954. The Commission, however, made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore. The Commission's figures as to the tonnage received at these two ports is limited to the period from July 31 to December 5, 1954, and no evidence was offered or considered as to the shipments during the year 1955 and 1956 preceding the date of the Commission's decision. The Commission did not pass on the testimony heretofore referred to in this opinion indicating that Labrador ore would seek the port offering the lowest cost of trans-

portation from the point of origin to the destination in steel producing territory.

The Commission did not undertake to appraise the relative weight of the various factors entering in its decision, but Division 2 stated the following general conclusions with respect to the proposed rates from Philadelphia, New York, and Boston:

> The evidence in support of the proposed adjustment from Philadelphia is substantially stronger than that offered in behalf of the proposed rates from New York and Boston. We are convinced that, in view of the earnings that would be yielded by the suspended rates from Philadelphia, such rates are not below a minimum reasonable level. We are of the view further that establishment of the proposed rates from Philadelphia will not result in disrupting the existing port relationship on traffic generally to destinations in differential territory. As indicated, the rates on iron ore from Baltimore and Philadelphia to the Pittsburgh area have been on a parity for over 50 years without disturbing the port relationship on the other commodities, and no good reason appears why the extension of this parity to ore-consuming points beyond Pittsburgh should change this situation. The record is persuasive that the iron ore tonnage through Baltimore will probably continue to increase regardless of the movement through Philadelphia.
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> Moreover, in administering the provisions of the act the Commission is required to carry out the national transportation policy, which has for its ultimate objective the development, coordination,

> and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. The evidence is certain that in the years to come a large proportion of the iron ore used in this country will originate in foreign countries. This iron ore is and will be an important factor in national defense. Especially in case of national emergency, it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port which could be incapacitated through congestion or other cause, and that, in the interest of national defense, Philadelphia and Baltimore be placed on a rate parity on imported iron ore as proposed in the schedule filed to become effective on February 19, 1953. Such a parity would not result in undue preference or prejudice.

Division 2 reached the ultimate conclusion that the proposed rates from Philadelphia to the differential territory were just and reasonable but that the rates from New York and Boston were not shown to be just and reasonable.

The general conclusions of the full Commission reaffirmed Division 2 with respect to rates from Philadelphia. They found that a substantial increase in iron ore imports would continue in that Labrador tonnage would increase to 10,000,000 tons in 1956 and to a greater extent in later years, and that the tonnage through Baltimore would probably continue to increase notwithstanding the maintenance of a parity rate with Philadelphia and also with New York. The Commission also reaffirmed the conclusions of

Division 2 with respect to the necessity for parity in carrying out the national transportation policy. In this respect it said:

> As stated in the prior report, we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its full share of the transportation burden, but it is of vital importance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports. These matters, among others of record, have been given consideration in reaching our conclusions herein.

New York and Boston rates:

The railroads serving New York and Boston pointed out the importance of being allowed to share in the new traffic based upon the importation of iron ore so as to replace the large revenues now received from domestic iron ore moving eastward from the Minnesota-Michigan ranges. The railroads also stressed the fact that business interests could not be expected to invest capital in constructing unloading facilities at New York or Boston unless parity of rates was established with Baltimore and Philadelphia, enabling the more

northerly ports to share in the business; and they also emphasized the importance of having one or more ports available to handle the new importations.

Division 2 of the Commission, however, pointed out the greater distances from New York and Boston to the differential territory and resulting in the smaller earnings at these ports under parity of rates. It said:

> * * * From New York and Boston to the 7 destinations in the Youngstown area, the short-line distances average 487 and 642 miles, respectively, whereas to the same destinations the short-line distances average 424 miles from Philadelphia and 380 miles from Baltimore. The average short-line distance from Philadelphia exceeds that from Baltimore by only 11.6 percent whereas the like distances from New York and Boston are greater by 28 and 70 percent, respectively, than the distance from Baltimore.
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> The proposed rates from Philadelphia compare favorably with rates applicable on iron ore from and to points in central and trunkline territories and thus come within the "zone of reasonableness" to which reference is made in *New York Central R. Co. v. United States, supra.* The proposed rates from New York and Boston would produce substantially lower revenues from those from Philadelphia. Moreover, the record shows that the facilities at New York and Boston are not adequate for the unloading of iron ore in substantial lots, and there is no positive indication that adequate facilities would be constructed thereat or that any substantial movement through those ports under the proposed rates could be ex-

pected. We conclude that, in the circumstances, the proponents of the proposed rates from New York and Boston have not sustained the statutory burden placed upon them to prove that these rates are just and reasonable.

Subsequent to the decision of Division 2 additional testimony was taken in which witnesses for the Boston & Maine and the New York, New Haven & Hartford indicated that unloading facilities would be established at Boston if equal rates with Baltimore were permitted, and similar representations as to the establishment of facilities at New York were made by persons interested in the development of that port. It was however made clear by all of the witnesses that facilities would not be established without assurances of parity of rates.

The Commission then made a comparison of revenues from the four north Atlantic ports to destinations in the Youngstown area. In one computation, using short-line distances, the following tabulation was made of the car-mile and ton-mile revenues on an average load of 62 gross tons and the rate from Baltimore of $3.035, which included the Ex Parte No. 175 increase, i. e., a general increase applied by the Commission to all the rates:

From—	Short-line distances	Car-mile	Ton-mile
	Miles	*Cents*	*Mills*
Baltimore	378	49.8	8.0
Philadelphia	424	44.4	7.2
New York	490	38.4	6.2
Boston	646	29.1	4.7

The Commission then considered certain cost studies submitted by the Erie Railroad for the single line haul from New York to Youngstown and for the joint haul with other railroads from Boston, and stated the final conclusion:

> We have carefully considered all of the evidence pertaining to the estimated out-of-pocket cost from New York and Boston. After restating the costs on the bases indicated, including the distribution of the costs of freight-train repairs, depreciation, and rentals of other than mileage cars over freight-train car-miles, loaded and empty, and the application of the unit cost to the loaded and empty car-miles of the imported ore, traffic, we conclude that $2.647 and $3.42 would more nearly approximate the out-of-pocket costs per gross ton from New York and Boston, respectively. On these bases, the rate of $3.035 would exceed the cost from New York by 38.8 cents per gross ton, but would be 38.5 cents less than the costs from Boston.

On this basis the Commission found that the Baltimore rate would be just and reasonable as applied to New York, but would not be just and reasonable as applied to Boston.

The Commission also found that the $2.51 rate from Baltimore to Youngstown proposed by the Baltimore railroads as of February 16, 1953, would not be just and reasonable despite the fact that a comparison of the car-mile and ton-mile revenues via short line distances under the $2.71 rate (without the Ex Parte No. 175 increase) from New York to Youngstown, with similar revenues under the $2.51 rate from Baltimore, shows that the latter would exceed the former.

The comparison is shown by the following table:

To Youngstown, Ohio

From—	Rate	Car-mile	Ton-mile
		Cents	*Mills*
Baltimore	$2.51	41.2	6.6
New York	2.71	34.3	5.5

In general, the Commission concluded that the natural advantages to which the Port of Baltimore would ordinarily be entitled were outweighed by the need to maintain ports of entry for iron ore at Philadelphia and New York and that this should be accomplished by diverting traffic from Baltimore to the other ports to such an extent that the facilities already established at Philadelphia may be more extensively and profitably used, and so that New York would be encouraged to build facilities which it does not now possess.

The weight to be given to the administrative findings of the Commission and the scope of the authority of the reviewing court are well established. The expert judgment of the Commission in respect to matters in the field committed to it by Congress must be recognized and its conclusions, if supported by substantial evidence on the whole record, must be accepted. The Court is not at liberty to substitute its judgment for that of the Commission. As was said in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the

> order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

The Commission is not required to make detailed findings of fact but must make the basis of its decision clear so that the reviewing court may perform its function. The matter was well stated by Judge Magruder in *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394, 400, affirmed, 342 U. S. 890:

> In *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 1930, 282 U. S. 74, 86–87, 51 S. Ct. 1, 75 L. Ed. 221, the Supreme Court, while upholding a Commission order, took occasion to criticize the Commission for the unnecessary burden cast upon the reviewing court by failure of the Commission to include in its report a complete statement showing the grounds upon which its determinations rested. Just how far the Commission is obliged by statute to go in this particular is not so clear as it might be. The Commission does have the duty to set forth in its report the "basic" or "essential" or "quasi-jurisdictional"

findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree. *United States* v. *Chicago, M., St. P. & Pac. Railroad Co.*, 1935, 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; *United States* v. *Baltimore & Ohio Railroad Co.*, 1935, 293 U. S. 454, 463, 55 S. Ct. 268, 79 L. Ed. 587; *Florida* v. *United States*, 1931, 282 U. S. 194, 215, 51 S. Ct. 119, 75 L. Ed. 291.

See also *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504–505; *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 211–212; and *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 653, where the failure of the Commission to explain adequately its departure from prior norms led to a remand of the case for more explicit findings.

The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the striking down of the long established differential in favor of Baltimore in order to enable Philadelphia and New York to have a share of the traffic and thereby insure their maintenance as ports of entry for the product.

The Commission in reaching its conclusions must of course give effect and adhere to the national transportation policy declared by Congress, which provides for the promotion of sound economic conditions among the several carriers and the establishment of reasonable charges for transportation services without unjust discrimination, undue preferences or advantages and without un-

fair or destructive competitive practices, to the end that a national transportation system may be built up, adequate to meet the needs of the commerce of the United States and of the Postal Service and of the national defense. See Preamble to 49 U. S. C. §§ 1, 301, 901, and 1101. However, in effecting this policy it is made unlawful for any carrier to give any undue or unreasonable preference to any person, locality or port, or to subject any person, locality or port to undue or unreasonable prejudice or disadvantage. 49 U. S. C. § 3 (1). The statute also provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carrier, proposing the rate to show that it is just and reasonable. 49 U. S. C. § 15.

In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its conclusions and whether there was substantial evidence to support the findings. In upholding parity of rates for Baltimore, Philadelphia, and New York, the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore. This ruling, moreover, has upset a railroad and Commission practice of many years duration in which the factor of distance was given effect. Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the opera-

tion of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *New York* v. *United States*, 331 U. S. 284, 305; *United States* v. *Illinois Central*, 263 U. S. 515, 524.

What are the findings upon which the Commission relies as the basis for its conclusion that there should be parity of rates between the ports notwithstanding the factor of distance? As to Philadelphia and Baltimore they seem to be:

1. That there is parity in respect of rates between Baltimore and Philadelphia as to other routes which involve differences in distance;

2. That in any event the difference in distance to the differential territory, measured from Philadelphia and Baltimore, is so insignificant that it should be disregarded; and

3. That the needs of the producers of steel and the requirements of the Postal Service and of the national defense make essential the maintenance of a plurality of ports for the importation of iron ore into the United States.

The propriety and sufficiency of these findings must be appraised against the historic background in which the differential in favor of Baltimore has been maintained. Undoubtedly it originated in the natural advantages derived from the shorter distance of the port to destinations in the west and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports not only by practical railroad men but by impartial

governmental authority in control. This practical solution of the difficulties arising from competition was based on solid legal ground, for it is settled that the law does not attempt to equalize opportunities among localities and that the natural advantage which belongs to a locality does not constitute a preference. *United States* v. *Illinois Cent. R. R. Co.*, 263 U. S. 515, 524; *New York* v. *United States*, 331 U. S. 284, 331–332; *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216, 229. The Commission itself is without authority to adjust rates and differentials for the purpose of diverting traffic from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another. *Texas and Pacific R. Co.* v. *United States*, 289 U. S. 627, 639.

This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may not reduce its rates to meet competition within the zone of reasonableness, but differences in rates based upon differences in length of haul, density of traffic and other elements of the cost of service are within a long standing practice of rate making, and a rate may not be filed for the purpose of diverting traffic from one locality in order to build up another. *Texas and Pacific R. Co.* v. *United States*, 289 U. S. 627, 636, 639. Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *New York* v. *United States*, 331 U. S. 284, 297, 298. The Commission in reaching its conclusion must consider all of these factors and may not condemn a difference in rates "unless it is shown not to be justified by the cost of the

respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Cent. R. R. Co.*, 263 U. S. 515, 524.

In passing upon the merits of the case, the Commission gave no consideration to the cost or value of the services of the railroads competing for traffic at Philadelphia and Baltimore. No evidence on these points was offered or required; but the ultimate finding of the Commission as to distances from Philadelphia and Baltimore to Central territory was that the difference is so insignificant that the service from both ports is substantially identical. Evidence to support this finding seems to us to be lacking. Not only does the disparity, which had been considered substantial for many years, still exist, but the only standard of measurement proffered by the Commission for its finding was obviously incorrect. The Commission declared that the actual operating route from Philadelphia to Central territory is only 11 miles greater than the operating route from Baltimore. This seems convincing until it appears, from a careful reading of the decision, that the Commission is comparing the distance via the Pennsylvania from Baltimore with the distance via the Pennsylvania from Philadelphia and that in doing so it measures the distance from Philadelphia over a direct route, but measures the distance from Baltimore over a circuitous line through Perryville, which the railroad company adopts for its own convenience. Clearly this treatment was wrong. The comparison should be made on the same basis in each instance, for example, between the short line distances or between the short tariff distances from

both ports, which shows a difference of 47 miles in the one case and 24 miles in the other. It is fair to say that the Commission, contrary to its former policy, either gave no weight whatever to the factor of distance or found that it was overborne by the general policy of supplying the needs of national commerce and the requirements of national defense.

We do not overlook the existence of parity of rates despite disparity of distances in respect to other commodities over other routes to which the Commission referred in its decision, seemingly as precedent for its present action. There was nothing new in this situation. These other rates had long existed but in spite of them the differential in favor of Baltimore on traffic moving to the Central territory had been maintained and carriers serving the port in reliance upon it had adjusted their rates and provided and maintained adequate facilities. We think that these other rates furnish no reasonable basis for change of view on the part of the Commission.

It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia, and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system. How far the Commission's authority extends in this direction is an interesting and important question. The respondents stress the passage of the Act of September 18, 1940, 54 Stat. 899, whereby the Act to regulate commerce was amended to include the

introductory declaration of the national transportation policy. This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the enforcement of all the provisions of the statute.[10] No one suggests, however, that the Commission has general authority to build up the transportation system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

For our purposes it is enough to determine whether there is substantial evidence to support the finding that a radical change in the rates was needed to support the national policy. In the first place, it is to be noted that there is no evidence of financial weakness on the part of the railroads involved as has led the Commission in some cases to fix rates in aid of the financial necessities of certain carriers. See *New England Divisions* case, 261 U. S. 184. The decision of the Commission is based on the general conclusion

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[10] *Luckenbach S. S. Co.* v. *United States*, 122 F. Supp. 824, affirmed, 347 U. S. 984; *Atlanta & St. Andrew's Bay Ruy. Co.* v. *United States*, 104 F. Supp. 193; *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 576; *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472.

that the northerly ports will have no share in the transportation of imported iron ore so long as the differential exists because ocean freights have been generally equalized since 1920 and the ore will inevitably be shipped to the port which enjoys the cheapest railroad rate to the interior.

Definite findings are made as to the ocean distances from major sources of iron ore to the north Atlantic ports, which show the distances from Labrador to be 950 miles to Boston, 1,187 miles to New York, 1,320 miles to Philadelphia, and 1,470 miles to Baltimore; and it is said that a round trip between Labrador and Baltimore requires about 3 more days than a round trip between Labrador and Boston. The Commission, however, does not attempt to review the considerable body of testimony bearing on the relative costs of ocean travel to the several destinations. A witness is quoted as saying that at the present time iron ore from foreign ports moves both in vessels owned by the steel companies and in chartered vessels; that charter agreements may be voyage charters or time charters; that the ocean rates of voyage charters are equalized to all North American ports; but that in some instances there is a cost saving in routing ore to the nearest port "on a time charter or for an integrated shipper."

These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore. There was direct testimony that water costs bear a direct relationship to the time spent in transit; that the investments in large ore carrying vessels are substantial and operating costs are

high, ranging from $1,000 to $2,000 per day; that the shipping season from Labrador is short and that time consumed in making round trips is an important element in moving the maximum tonnage to the destination; that vessels under a time charter and vessels owned by the steel companies would be routed to the nearest port, all other factors being equal; and that the ownership of vessels by the steel companies is expanding. The weight of all this testimony tends strongly to support the view that ocean costs will be an influential if not a determining factor in selecting the ports of destinations, which basis is lacking for the general conclusion of the Commission that without parity of rates Philadelphia will have no share in the traffic. On the contrary, shipments during a few months in 1954, the only period considered, indicate that under parity the ore will go to Philadelphia rather than to Baltimore, since Philadelphia enjoys the double advantage of smaller ocean costs and the most modern unloading facilities.

In the absence of specific findings, it does not seem reasonable to destroy a long established differential on the strength of which the railroads serving Baltimore have made large investments and the commercial interests of the port have made their arrangements. Obviously it is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to greatly increase. The port will still be entitled to the benefits of its geographical position and the expected profits of the new business may not

be diverted merely to satisfy the desire of other ports to share therein.

We think, however, that the record furnishes a reasonable basis for the decision of the Commission to retain parity of rates between Baltimore and Philadelphia in respect to traffic to Pittsburgh. Similar reasons for the maintenance of the status quo apply as in the case of Baltimore. It is true that, so far as iron ore is concerned, only a paper rate was involved until recently; nevertheless, parity has existed for more than 50 years with the acquiescence of Baltimore, and it was retained without objection in the revision of rates in 1950 when the rate of imported iron ore from Philadelphia to the Pittsburgh area was reduced by the same amount as the rate from Baltimore. While there had been no significant movement of iron ore from Philadelphia to the steel mills in the Pittsburgh area during this period, there was, as the report of Division 2 of the Commission shows, a substantial movement from Baltimore to this district. The Pennsylvania Railroad announced its intention, in August 1951, to erect a modern unloading facility in South Philadelphia with the obvious purpose to share in this traffic and in its expected increase, but no objection to the existing parity of rates came from the Baltimore railroads until they made their tactical move in 1953 in order to preserve the consistency of their position.[11] In our opin-

[11] The respondent railroads contend that parity as to Pittsburgh is inconsistent with the differential as to the Central territory, pointing out that Youngstown, one of the points in that territory, is 66 miles distant from Pittsburgh over the Pennsylvania Railroad as compared to 76

ion, it is of great significance that Philadelphia interests have made a large capital investment in providing unloading facilities in the belief that the historic situation would be retained; and it would be unreasonable at this time to deny them the opportunity to make use of the structure which they have set up.

The lack of substantial basis for the allowance of parity to the Port of New York is shown by what has already been said; but it may be added that the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to considerations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs by 38.8 cents per ton. For this reason alone the rate was found to be just and reasonable; and yet in the same opinion the Commission found that the rate of $2.51 from Baltimore, proposed by the Baltimore railroads to take effect February 16, 1953, that is to say, 20 cents under the current rate, would not be just and reasonable, although the evidence shows that the return thereon would exceed the return on the New York rate which the Commission ap-

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miles over the Baltimore and Ohio. This incongruity, however, does not present a new element for it has existed throughout the history of the differential and, in any event, we are concerned not with the comparative distances from Pittsburgh but with comparative distances from the ports of Philadelphia and Baltimore.

proved. As the four dissenting commissioners point out, the only justification in the record for the proposed rates from New York "is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore."

We conclude (1) that the orders of the Commission should be affirmed insofar as they disapprove the schedules filed to become effective on February 16, 1953, proposing reduced rates from Baltimore to the Pittsburgh and Central areas, and the schedules filed to become effective on February 16, 1953, and March 11, 1953, from Philadelphia to the Pittsburgh and Central areas, respectively; and (2) that the orders be vacated insofar as they approved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined; and (3) that, insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect; and (4) that, pending said findings and a decision based thereon, parity between the ports of Philadelphia and Baltimore be retained upon the assumption that steps be taken to secure a prompt determination.

The orders of the Commission are modified and the case is remanded to the Commission for further proceedings consistent with this opinion.

We concur in this opinion:

W. CALVIN CHESNUT,
United States District Judge.

R. DORSEY WATKINS,
United States District Judge.

APPENDIX B

In the District Court of the United States for the District of Maryland

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Civil Action No. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, CANTON RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY, BALTIMORE ASSOCIATION OF COMMERCE, THE BALTIMORE CHAMBER OF COMMERCE, THE STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC., BALTIMORE CUSTOM HOUSE BROKERS AND FORWARDERS ASSOCIATION, THE MAYOR AND CITY COUNCIL OF BALTIMORE, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE AND THE PENNSYLVANIA RAILROAD COMPANY, AND C. W. BOIN, AGENT, AND THE NEW YORK CENTRAL RAILROAD COMPANY AND ERIE RAILROAD COMPANY, DEFENDANTS

(Filed 22d May 1957)

Decree

This 22d day of May 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investiga-

tion and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed: to wit, it is:

ORDERED, ADJUDGED, AND DECREED

1. That the order of the Interstate Commerce Commission dated October 1, 1956, is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorizes the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956, enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956, insofar as it approves the tariff schedules of the Pennsylvania

Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953, is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the Opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953, be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October [illegible] 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953, and March 11, 1953.

(S) MORRIS A. SOPER,
United States Circuit Judge.

(S) W. CALVIN CHESNUT,
United States District Judge.

(S) R. DORSEY WATKINS,
United States District Judge.

APPENDIX C

STATUTES INVOLVED

National Transportation Policy [49 U. S. C. preceding §§ 1, 301, 901, and 1001] provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulations of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3 (1) [49 U. S. C., § 3] provides:

> It shall be unlawful for any common carrier subject to the provisions of this

part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 15 (7) [49 U. S. C., § 15] provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a

statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding had not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed

changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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Nos. 463, 464, 465, 466, 467, 468, 473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ERIE RAILROAD COMPANY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

THE NEW YORK CENTRAL RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ARMCO STEEL CORPORATION, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

DELAWARE RIVER PORT AUTHORITY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

On Appeal From The United States District Court For The District Of Maryland

REPLY TO BRIEFS IN OPPOSITION TO MOTION TO AFFIRM

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November 12, 1957.

The Daily Record Co., Baltimore 3, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 463

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 464

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 465

ERIE RAILROAD COMPANY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 466

THE NEW YORK CENTRAL RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 467

ARMCO STEEL CORPORATION, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 468

DELAWARE RIVER PORT AUTHORITY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 473

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

On Appeal From The United States District Court For The District Of Maryland

REPLY TO BRIEFS IN OPPOSITION TO MOTION TO AFFIRM

Preliminary Statement

There are three reasons why the appellees submit this reply to the appellants' briefs in opposition to the motions to affirm in Nos. 464, 465, 466, and 467. Although the same motions were also filed in Nos. 463, 468 and 473, the appellants therein have filed no briefs in opposition.

The first reason is that the appellants seek to confuse the issue by pretending that this is not a relationship case. The second is that the appellant Pennsylvania Railroad cites a decision of the Interstate Commerce Commission which is dated October 25, 1957, or 9 days after the motion to affirm was filed. The third is that the appellant Erie Railroad and other New York appellants accuse the appellees of "attempting to mislead" the Court "as to the nature of the District Court's decree".

In the motions to affirm already filed with this Court on October 16, 1957, there are full statements of the facts in this litigation, the reports of the Interstate Commerce Commission,[1] and the decision of the three-judge District Court which reversed it.[2]

Argument

We shall consider each of these three reasons separately.

First. In arguing that this is not a relationship case, the appellants seek to avoid the consequences of the inadequate findings by the Commission. They say that the District Court was wrong in holding that the Commission "prescribed" equal rates from the ports of Baltimore, Philadelphia, and New York, and to support their point the appellant Pennsylvania Railroad quotes a *part* of a sentence from our motion to affirm.[3]

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[1] *Iron Ore from Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527, 299 I.C.C. 195.

[2] *The Baltimore & Ohio Railroad Company et al. v. United States et al.*, 151 F. Supp. 258.

[3] The appellant Pennsylvania Railroad, at p. 3 of its reply, quotes these appellees as saying that "The Commission did not prescribe parity as a principle." The entire sentence in appellees' motion to affirm reads as follows: "The Commission did not prescribe parity as a principle to govern future rate-making, nor did it make any findings which would preclude rates on different levels if justified by a different record."

When the District Court used the verb "prescribe" to indicate what the Commission's action in this proceeding had been, it had in mind the substance, not the form. For the Commission had approved rates which produced parity and disapproved rates which disrupted parity; and the net result was a requirement of parity in the light of the rates which had been proposed in the particular proceeding before it. In point of fact the Commission itself used the verb "prescribe" to describe its action in the present case. In the same decision[4] of October 25, 1957, cited at p. 8 of the Pennsylvania Railroad's reply, the Commission observed (Sheets 12-13, 18):

> The described evidence would inject into this proceeding the issue of port relationship as between Philadelphia and Baltimore, *which was decided in Iron Ore from Eastern Ports to C.F.A. Points, 291 I.C.C. 527 and 299 I.C.C. 195. Our order therein is the subject of court proceedings.*
>
> * * * * * *
>
> *As previously noted, in Iron Ore from Eastern Ports to C.F.A. Points, supra, we required a parity of rates from Philadelphia and Baltimore. In view of the required cancellation herein of the proposed rates from Philadelphia, the maintenance of the prescribed parity requires the prompt cancellation also of the proposed rate from Baltimore under suspension in the above-mentioned second supplemental order.* We shall expect the Baltimore carriers to take such action.

We note with interest that three days after the release of the foregoing report the Commission issued a "corrected" report deleting the italicized passages.

Second. On a round-trip by ocean from Labrador (Seven Islands, Quebec) to Philadelphia there is a saving of 310

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[4] *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, I. & S. Docket No. 6742, . . I.C.C. . . decided October 25, 1957 (mimeographed).

nautical miles as against a round-trip to Baltimore. This of course is highly significant in any case involving the relationship of import rates by rail from these two ports. In the first place, the Labrador ore interests (which are also appellants herein)[5] employ their own vessels for a heavy part of this ocean transportation and the saving of nautical miles is a saving of steaming time which, in turn, represents money in their pockets. In the second place, the same Labrador ore interests are vitally concerned with obtaining high vessel utilization, and a saving of 310 miles on the average round-trip means almost two more round-trips to Philadelphia than are possible to Baltimore during the limited ore shipping season from Labrador.

These are the factors which, not dealt with in the Commission's decision approving equal rail rates, caused the District Court to remand for further findings. For obviously, if Philadelphia already has the advantage on the ocean part of the through transportation, equal rail rates with Baltimore will give it an advantage on the through transportation from Labrador to Youngstown; and it is the through transportation which counts. The Commission's error is compounded by the fact that this advantage accrues to the benefit of the port (Philadelphia) with the longer rail distances to destination — a situation which, for 80 years, has justified higher rates from Philadelphia than from Baltimore on import traffic.

In contesting the District Court's remand, the appellant Pennsylvania says in its reply (at p. 8) to the motions to affirm:

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[5] Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Company (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, and The Youngstown Sheet and Tube Company (collectively known in this litigation as the Labrador ore interests).

> In a recent decision, *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, Investigation and Suspension Docket No. 6742, ... I.C.C. ....., decided October 25, 1957 (mimeographed), in which the question of ocean costs from Labrador to Philadelphia and Baltimore was injected by these appellees, the Commission found the uncontroverted testimony to be that, regardless of whether the ocean movement from Seven Islands is to Philadelphia or Baltimore, the charge to the shipper for a particular vessel is the same, whether it is controlled by the shipper or is under charter or contract of affreightment (Sheet 13).

In other words, according to the Commission, if the Labrador ore interests pay *themselves* $1.00 per ton for hauling ore from Labrador to either Philadelphia or Baltimore those two ports occupy equal competitive standing despite the fact that the costs of this same transportation to the same Labrador ore interests may be 70 cents in the case of Philadelphia and 90 cents in the case of Baltimore.

The fallacy of the Commission's conclusion is evident. Instead of providing a reason against the District Court's order in the instant case, the Pennsylvania Railroad, by citing the decision of October 25, 1957, only emphasizes the propriety of the remand and the necessity of upholding it. Certainly, in a relationship case involving an important use of private transportation the Commission cannot stop at what the shipper takes out of one pocket without knowing what he puts back in the other pocket.

Moreover, by citing the decision of October 25, 1957, the Pennsylvania Railroad in no way contradicts the advantage which Philadelphia, because of its shorter ocean distance, has over Baltimore in allowing approximately two more round-trips during the ore shipping season by other vessels which, while not owned or controlled, are under long-term contracts of affreightment to the Labrador ore interests.

Third. In the reply to the motions to affirm filed by the New York appellants the appellees are accused of "attempting to mislead" this Court. The New York appellants (at p. 6 of their reply) say:

> Having mislead the District Court into believing that the Commission had prescribed a parity of rates and having secured a reversal by the District Court, the Baltimore railroads now urge this Court to affirm the District Court decision by attempting to mislead it as to the nature of the District Court's decree.

The New York appellants go on to say (at p. 7 of their reply) that under the terms of the District Court's decree "the New York carriers would never be able to make effective equalizing rates from New York if the District Court's order is affirmed," and they refer to its second paragraph. This paragraph (which the New York appellants inaccurately paraphrase) provides in *full* as follows:

> 2. That the Temporary Restraining Order issued by the Court on October 26, 1956, enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

There is nothing in this paragraph which would prohibit the same rates from New York as from the other ports provided they can be justified as lawful under the provisions of the Interstate Commerce Act. In no sense is it a continuing order directed against parity as such. On the contrary, the decree is directed against rates named in specific tariff schedules "filed to be effective February 9, 1953." To Youngstown these schedules included a rate of $2.71 from New York. Since this rate was proposed, the Baltimore rate

to Youngstown has been increased to $3.67. Under the decree there is certainly no bar to New York's trying to justify equalization at the present $3.67 level, or any other level that may apply. Even if the Baltimore rate should go back to the $2.71 level at some time in the dim future, the decree would not bar a New York proposal to match it.

This does not mean, if New York should try again, that its burden of proof would be any less or that it could escape a showing that parity rates from New York were properly related to those from Baltimore. In the present record of course there was a complete failure of proof in this regard, and what is more, the Commission failed to make adequate findings. Accordingly, the District Court had no option but to enjoin the rates from New York.

Conclusion

The motions to affirm should be granted. The briefs in opposition only emphasize the propriety of such action on the part of this Court.

Respectfully submitted,

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November 12, 1957.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 463

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 464

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THE NEW YORK CENTRAL RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

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ARMCO STEEL CORPORATION, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 468

DELAWARE RIVER PORT AUTHORITY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 473

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

On Appeal From The United States District Court For The District Of Maryland

MOTION TO AFFIRM

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October 16, 1957.

The Daily Record Co., Baltimore 3, Md.

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No. 473
UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

On Appeal From The United States District Court For The District Of Maryland

MOTION TO AFFIRM

Appellees,[1] pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court, move that the judg-

[1] The Baltimore and Ohio Railroad Company and Western Maryland Railway Company.

ment of the United States District Court for the District of Maryland be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement of the Case

This is a direct appeal from a judgment of a statutory three-judge District Court entered on May 22, 1957 pursuant to U. S. Code, Title 49, sec. 17(9) and Title 28, secs. 2321-2325. The opinion of the District Court is reported as *The Baltimore and Ohio Railroad Co., et al. v. United States of America, et al.*, 151 F. Supp. 258. By its judgment the District Court decreed that an order of the Interstate Commerce Commission dated October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, 299 I.C.C. 195, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed.

The facts as shown by the report of the Interstate Commerce Commission and as found by the District Court may be summarized as follows:

After World War II the importation of iron ore from foreign sources in heavy volume became an important prospect. For some time steel plants along the North Atlantic coast had been using such iron ore, and there had been movements to Johnstown and Pittsburgh, Pa. About 1950, however, there was promise of heavy consumption at many inland plants, including those located at points within an area known for years in transportation circles as "differential territory," or "central territory." This is territory generally west of a line drawn between Buffalo, New York, and Pittsburgh, Pa. It includes Youngstown, Ohio,

and the 16 other steel-producing points which are directly involved in this litigation.[2]

A principal source of this import iron ore is Labrador. It moves by railroad to the port of Seven Islands, Quebec, thence by water either through the St. Lawrence Seaway to destinations on the Great Lakes or by ocean carrier to a North Atlantic port. In the first case the ore, if not consumed at the lake-front, is transported inland to steel plants in differential territory by rail; and in the second case the ore moves from tidewater to the same differential territory by rail. The owners of the Labrador ore are the Armco Steel Corporation and the other steel companies[3] which, along with M. A. Hanna Company, are among the appellants in this proceeding (hereinafter referred to collectively as the Labrador ore interests). The joint venture which produces the iron ore and brings it to this country goes under the name of the Iron Ore Company of Canada, also an appellant herein, and several subsidiary transport companies. The ownership or control of ocean ore carriers is an integral part of the operation; along with vessels under trip charters, they provide what amounts to shuttle service between the Canadian port of Seven Islands on the St. Lawrence and the ports of discharge in the United States.

The controversy over railroad freight rates from the North Atlantic ports which has culminated in this appeal had its beginning when, on February 9, 1953, the appellant

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[2] In addition to Youngstown, Ohio, the destinations involved in this controversy are: Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowellville, Niles, Struthers, and Warren, Ohio; Benwood, E. Steubenville, Follansbee, Weirton, and Wheeling, W. Va.

[3] Aside from Armco Steel Corporation, the appellant steel companies, each with an interest in Labrador ore, include National Steel Corporation (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, and the Youngstown Sheet and Tube Company.

Pennsylvania Railroad, with an eye to forcing the movement of import ore through Philadelphia, attempted to publish rates from that port to the 17 destinations in differential territory which were the same as the rates from the port of Baltimore. Contemporaneously, the appellant railroads serving the port of New York published from that port the same Baltimore rates to the 7 stations among the 17 that they were able to reach. The appellee Baltimore railroads thereupon reduced their rates in an effort to continue the traditional differential under Philadelphia, and these further reductions were later matched by the appellant Pennsylvania Railroad with a second reduction from Philadelphia — in an effort to continue parity although on a lower level. It was at this point that the Commission intervened and suspended *all* the proposed rate reductions and instituted an investigation under the provisions of Section 15(7) of the Interstate Commerce Act.

While import iron ore comes in volume from other countries, originating from such scattered foreign sources as Sweden, Liberia, and Venezuela, among others, the prospective Labrador ore is the special prize of this contest over freight rates. This is because it requires relatively more rail transportation, particularly to destinations in differential territory where the Labrador ore interests have their steel plants. Ore from the other foreign sources is largely controlled by steel companies with major operations at tidewater (such as the Sparrows Point plant of the Bethlehem Steel Corporation at Baltimore and the Fairless plant of the United States Steel Corporation on the Delaware River at Morrisville, N.J.), and there is relatively less need for comparable rail service.

As stated in the opinion of the District Court (151 F. Supp. at 264):

> Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953 and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus, in the eight months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation.
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> * * * * * *
>
> Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation.

Adding emphasis to this finding by the District Court is the fact that the only consumers of iron ore to join in the appeal from its judgment are the Labrador ore interests. The New York appellants, moreover, specifically recognize that "most of the ore presently coming through Philadelphia and Baltimore to the Youngstown area originates in Labrador * * *" (Juris. St. of Erie et al., herein referred to as New York appellants, at 24).

The publication of Baltimore rates from Philadelphia and New York constitutes a direct challenge to a relationship in rates which had existed for almost 80 years. Since 1877, in fact, the rates on export and import traffic through Baltimore have been 20 cents per ton less than the Philadelphia rates and 60 cents less than the New York rates. These differentials give partial recognition to the fact that between Baltimore and destinations in differential territory the rail distances are less than Philadelphia's and

much less than New York's. We say "partial" recognition because if the rates were strictly related to differences in distance, Baltimore's differential would be 33 (instead of 20) cents under Philadelphia and 80 (instead of 60) cents under New York.

A picture of these port relationships is given in the following table which shows the distances to Youngstown, Ohio, the key destination involved in the present litigation, from Baltimore, Philadelphia, and New York, together with the normal rates from Baltimore and the proposed reductions from the other ports:

Port	*Rate*	*Short-line Distance*[a]	*Short Tariff Distance*[b]
Baltimore	$2.71 (normal)	378	381
Philadelphia	2.71 (proposed)	424	428
New York	2.71 (proposed)	490	569

[a] The shortest rail mileage over which carload traffic can pass without charge of lading.

[b] The shortest published route used in every day operation. Youngstown is on the eastern border of differential territory, and the indicated differences in distance are greater when the entire territory is taken into account.

Following the Commission's suspension of the reduced rates, it undertook an investigation pursuant to the provisions of Section 15(7) of the Interstate Commerce Act. Hearings were held in 1953, or before there was any ore movement from Labrador. On February 5, 1954, Division 2 of the Commission filed its report with the conclusions (1) that the reduced rates from Philadelphia of February 9, 1953, as proposed by the Pennsylvania "are just and reasonable," but (2) that the other reductions, including those proposed from New York on the same date, "are not shown to be just and reasonable." *Iron Ore from Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527 at 556.

Within three days after the announcement of this decision the Commission allowed the reduced Philadelphia

rates to go into effect, and for the first time there came into being an actual parity of rates on imported iron ore from Philadelphia and Baltimore to the 17 destinations in differential territory. An effort on the part of the appellees to forestall this publication and in effect to continue the suspension while the litigation continued was rejected by the United States District Court for the District of Maryland "on the ground that the administrative process had not been completed." (Civil Action No. 7140).

There followed numerous petitions for reconsideration of the decision of Division 2, including one by these appellees, and on July 30, 1954, the Commission reopened the proceeding for further hearing. This was completed in late 1954, shortly after the initial shipments of Labrador ore had been made. Importation of this ore through the North Atlantic ports had begun in August of that year; during this first season it was limited to a fraction of the anticipated annual production of 10 or more million tons. But even with respect to this small sample the parity rates at Philadelphia attracted the bulk of the competitive tonnage away from Baltimore.

Almost two years after the further hearing, or on October 1, 1956, the decision of the Commission was reached. (299 I.C.C. 195). It reaffirmed the prior conclusion of Division 2 that the reduced rates of February 9, 1953, from Philadelphia "are just and reasonable" but, with four commissioners dissenting, it reversed the finding of Division 2 as to the proposed reduced rate from New York to Youngstown and held that this rate would be "just and reasonable." (299 I.C.C. 210).

It was this Commission decision "on further hearing" that the appellees as plaintiffs complained of in the United States District Court for the District of Maryland.

The Decision of the District Court

In its decision of April 26, 1957 — the decision which is the subject of this motion to affirm — the District Court (speaking through Circuit Judge Soper, with District Judges Chesnut and Watkins concurring) concluded (1) that the orders of the Commission should be "vacated insofar as they approved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined," and (2) that "insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect." (151 F. Supp. at 278).

This controversy turns on port rate relationships, and in its decision the District Court promptly recognized this crucial issue. After pointing out that the Commission's finding of reasonableness did not necessarily mean that the rates were properly related, the Court held that the transportation standard[4] was the correct test to use, and that the

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[4] As stated in *United States v. Illinois Cent. R.R.*, 263 U. S. 515 at 524: "To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

Commission had made a plain mistake in its application to the rates from Philadelphia and Baltimore. But the District Court did not stop at this point. It expressly recognized that differences in transportation conditions, as represented by differences in distance, may not necessarily exclude a parity of rates if it involves no undue preference or prejudice.[5] It held (151 F. Supp. at 274):

> Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *New York v. United States*, 331 U. S. 284, 305, 67 S. Ct. 1207, 91 L. Ed. 1492; *United States v. Illinois Central*, 263 U. S. 515, 524, 44 S. Ct. 189, 68 L. Ed. 417.

The District Court thus recognized that the setting aside of the transportation standard of distance can only be done in the interest of fair competition where no undue preference or prejudice will result. It should never be done to give a competitive advantage to longer-haul ports.

In brief, the reason the District Court upset the order of the Commission was that it promised to give the longer-haul ports of Philadelphia and New York — not competitive equality with Baltimore — but clear competitive advantages. Philadelphia is already one day's steaming time

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[5] Section 3(1) provides that it shall be unlawful for any carrier "to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . port, port district, gateway, . . . in any respect whatsoever; or to subject any particular person . . . port, port district, gateway, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . .". As pointed out in *New York Central Railroad Co. v. United States*, 99 F. Supp. 394 at 404, Section 3(1) is "the only section of the statute specifically dealing with the matter of port relationships."

nearer Labrador than Baltimore on the round-trip by ocean, and New York is over two days nearer. In the ordinary case these shorter ocean distances may not mean too much, but in the movement of Labrador ore they are truly significant. In the first place, a large part of this ocean movement is in vessels owned by the steel companies, and the lesser steaming time to Philadelphia and New York is money in their pockets. In the second place, the lesser-steaming time means more trips to these two ports and thus more ore during the limited shipping season. This greater vessel utilization is a factor of much importance to the Labrador ore interests which are appellants here.

The Commission did not find the dispositive facts in this regard or give them meaning. It found that for a round trip the ocean distance between Labrador and Philadelphia is 310 nautical miles less than between Labrador and Baltimore; and between Labrador and New York it is 576 miles less. In its report on further hearing the Commission also found (299 I.C.C. at 198):

> In some circumstances, however, there is a saving of cost to the shipper in routing ore to the North Atlantic port nearest to the port of origin. This might be true on a time charter arrangement or for an integrated shipper.

But there the Commission left the subject unresolved.

Obviously, if Philadelphia and New York have advantages over Baltimore in the ocean transportation from Labrador, they do not also need Baltimore's rail rates to destinations in differential territory to be fairly competitive. The combination would give them clear advantages in the *through* transportation, and it is only with the cost of the *through* transportation that the Labrador ore interests are concerned. Otherwise stated, the application from

Philadelphia and New York of the same rates as from Baltimore would give to these two longer-haul ports (1) rates which are relatively lower, distance considered, than from Baltimore with no transportation standard to justify the difference, (2) rates which are clearly lower than necessary to meet the competition and thus unreasonable under Section 1(5), and (3) rates which violate Section 3(1) by unduly preferring Philadelphia and New York and unduly prejudicing Baltimore.

By its order of remand, therefore, the District Court would have the Commission determine whether parity rates from Philadelphia are lower than necessary to meet the competition and are also unduly preferential and prejudicial. On both of these questions the facts concerning ocean transportation are vital. The same is true of the tonnages which have been passing through the ports of Philadelphia and Baltimore since parity became effective February 19, 1954.

In the case of the New York rates the District Court went one step further and enjoined the establishment of the parity rate schedules which the Commission approved. Here, as distinguished from its treatment of the Philadelphia rates, the Commission did not even go through the form of making the necessary findings, and consequently, its final order was void for lack of basic findings. Since the District Court distinguished between the two rates in its conclusions and final judgment, they will be treated separately in this motion to affirm.

Argument

I.

The Lack of Substance in the Questions Put by Appellants Concerned With the Rate from Philadelphia.

The several arguments made by the appellants in their statements of jurisdiction will be dealt with separately as follows:

First. Certain appellants say that the nature of the case is not understood by the District Court, and they point to its use of the word "prescribe" as falsely describing the action taken by the Commission in approving Philadelphia rates on the Baltimore level.[6] They also say that the Commission did not "strike down" the existing differential.[7]

The District Court fully understood the nature of the case. It pointed out (151 F. Supp. at 274):

> The statute * * * provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carrier, proposing the rate to show that it is just and reasonable. 49 U.S.C.A. sec. 15.
>
> In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its conclusions and whether there was substantial evidence to support the findings.

The District Court's use of the words "prescribe" and "striking down" fairly describes the substance of what the

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[6] Juris. St. of PRR at 9. Cf. Juris. St. of appellant Erie and N. Y. Central Railroads (hereinafter referred to as New York appellants) at 18, 19.

[7] Juris. St. of PRR at 10.

Commission did on the basis of the record before it. For the Commission required (or "prescribed") parity by approving Baltimore rates from Philadelphia and disapproving lower rates from Baltimore at the same time. These two steps, purposely related, undermined (or "struck down") the traditional differential so far as this proceeding is concerned.

Second. The appellants argue that the District Court would require rate relationships to be governed by differences in distance,[8] and the appellant Interstate Commerce Commission says:

> . . . it is submitted that the Commission did not err in not requiring the Pennsylvania to base its rates from Baltimore and Philadelphia on a distance scale.[9]

The appellants clearly misunderstand the decision of the District Court.

If the rates from Philadelphia and Baltimore were related by what the appellant Commission refers to as a "distance scale," the Baltimore rate would be 33 cents lower than the rate from Philadelphia. Actually, the differential which has obtained in these rates for a period of almost 80 years when applied to export and import traffic generally[10] has been limited to 20 cents, or less than two-

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[8] Juris. St. of PRR at 14; Juris. St. of Labrador ore interests at 15.

[9] Juris. St. of ICC at 15.

[10] The appellant PRR says that this differential has been generally limited to "grain and merchandise traffic" and does not apply to "low-grade, heavy-loading, raw materials moving in volume in open-top cars, such as iron ore, coal and coke." Juris. St. of PRR at 11. But in various rate proposals made in the past the PRR has itself sponsored the differential as applicable to import iron ore rates, and it has been so applied (ICC Rec. at 654-674). Moreover, the PRR's implication that equal rates apply to export coal is false. The differential Baltimore under Philadelphia is 7 cents per ton. Coke does not move from differential territory in foreign commerce. Traditional differentials apply to commodities generally whether high-grade, light-loading, finished materials or "low-grade, heavy loading, raw materials."

thirds of the amount justified by a "distance scale." But the District Court recognized that even the 20-cent differential might properly be set aside if required by competitive conditions, and as we have seen, it held (151 F. Supp. at 274):

> Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *State of New York v. United States*, 331 U. S. 284, 305, 67 S. Ct. 1207, 91 L. Ed. 1492; *United States v. Illinois Central R. Co.*, 263 U. S. 515, 524, 44 S. Ct. 189, 68 L. Ed. 417.

And after pointing out the Commission's lack of power to divert traffic "from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another," the District Court added (151 F. Supp. at 275):

> This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may not reduce its rates to meet competition within the zone of reasonableness. . . .

Instead of requiring adherence to the test of comparative distances, the District Court's remand is for a different purpose, viz., to determine whether the Commission's according of parity rates to Philadelphia gives to the Pennsylvania Railroad a rate lower than necessary to meet the competition under Section 1(5) and to the port itself a rate which is unduly preferential and thus in violation of the provisions of Section 3(1). Philadelphia already has the benefit of shorter ocean distances from Labrador, and when this is added to an inland rate on the same level

as from the shorter-haul port of Baltimore, Philadelphia will of course gain a material competitive advantage in connection with the through service from Labrador to Youngstown. That is the indefensible result which the District Court would guard against — particularly since there is no justification from a transportation standpoint for a lower rate (distance considered) from Philadelphia.

Third. The appellants say that the District Court erroneously criticized the Commission's finding that over the routes of the appellant Pennsylvania Railroad serving both Baltimore and Philadelphia the difference in distance to Youngstown is only 11 miles, and "the service is substantially identical."[11] As put by the appellant Interstate Commerce Commission:

> . . . the Commission found that the service over the Pennsylvania Railroad is substantially identical from both Philadelphia and Baltimore, and it is submitted that this is a rational test for the Commission to use in determining whether a railroad is discriminating against a port. The fact remains, and it is not questioned, that the actual operating distance, that is the actual route of movement over the Pennsylvania Railroad from Baltimore and from Philadelphia to differential territory is substantially the same, the Pennsylvania's operating route from Philadelphia to Youngstown being only 11 miles greater than its operating route from Baltimore. The court, however, states that this standard of comparison is erroneous and holds that the Commission should have used not the route of actual travel, but the theoretical short-line distances or the tariff route distances between these ports and differential territory.[12]

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[11] Juris. St. of ICC at 15; Juris. St. of PRR at 15, 16; Juris. St. of Labrador ore interests at 15, 16.

[12] Juris. St. of ICC at 16.

Again there is clear misunderstanding.

All that the District Court did was to point out that from Baltimore the route of the Pennsylvania is circuitous (as compared with the more direct routes of both the appellee Western Maryland and appellee Baltimore and Ohio) and consequently, the difference of 11 miles between the *direct* route from Philadelphia (operated by the Pennsylvania) and a *circuitous* route from Baltimore (also operated by the Pennsylvania) is without meaning. It is a comparison of unlike things. In a contest such as this over a proper relationship in rates it is elementary that, to the extent comparative distances are a factor, each port (or any other complaining interest) is entitled to its short distance. *Ex-Lake Grain from Ogdensburg to New England*, 208 I.C.C. 385, 391; *Commercial Club of Greeley v. C. & S. Ry. Co.*, 53 I.C.C. 66, 69. As appears from the table on p. 6 supra, the short tariff route from Baltimore is made by the appellee Western Maryland, and when its *direct route from Baltimore* is compared with the Pennsylvania's *direct route from Philadelphia*, the Baltimore distance is 47 miles less. A possible inference from p. 17 of the jurisdictional statement of the appellant Commission that short tariff distances are "theoretical" and do not represent actual operating routes would be false.

Fourth. Certain appellants say that the District Court failed "to accept or give weight to the Commission's finding that the iron ore rate from Philadelphia at issue is just and reasonable, under Section 1(5) of the Act".[13] But rates within the zone of reasonableness may still violate the provisions of Section 3(1), and the District Court correctly held that (151 F. Supp. at 275):

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[13] Juris. St. of Delaware River Port Authority, at 7.

> Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *New York v. United States*, 331 U.S. 284, 297, 298.

As Mr. Justice Brandeis stated in *United States v. Illinois Cent. R.R.*, 263 U.S. 515, 524, the mere fact that one rate is "inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice."

Moreover, one important aspect of a finding of reasonableness under Section 1(5) is that the rate be no lower than necessary to meet the competition. *Petroleum between Washington, Oregon, Idaho, and Montana*, 234 I.C.C. 609, upheld in *Scandrett v. United States*, 32 F. Supp. 995, aff'd. per curiam, 312 U.S. 661. No such finding can of course be made here. That is another reason why the District Court was unable "to accept or give weight" to the Commission's conclusion that the parity rate from Philadelphia was reasonable under Section 1(5).

Fifth. Appellants say that "Of the greatest importance is the failure of the District Court correctly to apply, interpret and weigh the National Transportation Policy in connection with the issues presented,"[14] and other appellants argue that "In refusing to accept the Commission's finding that a parity of iron ore rates, Philadelphia with Baltimore, is in accordance with the National Transportation Policy, the court has committed serious error."[15] Still other appellants go so far as to contend that:

> Without such Philadelphia-Baltimore rate parity in the event of war or national emergency, in the event

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[14] Juris. St. of Delaware River Port Authority at 7, 8.
[15] Juris. St. of PRR at 19; Juris. St. of ICC at 17.

> of incapacity or over-burdening of the iron ore handling facilities at Baltimore, with completely inadequate facilities at Philadelphia, the national safety could very well be seriously threatened, if not actually jeopardized.[16]

These arguments are beside the point. The District Court did not refuse to accept the Commission's findings in regard to the National Transportation Policy. On the contrary, there was no reason to consider them because the competitive need for parity had not been established first. The District Court, referring to the declaration of the National Transportation Policy in 1940, held (151 F. Supp. at 276):

> This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the enforcement of all the provisions of the statute. No one suggests, however, that the Commission has general authority to build up the transportation system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

None will argue that a transportation system adequate for national defense, as one of the objectives of the National Transportation Policy, is fostered by unlawful rate relationships. Indeed, the policy expressly provides that the Commission, in administering the Act and moving towards its objectives, including a transportation system adequate for

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[16] Juris. St. of Labrador ore interests, at 18.

national defense, shall "encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantage. . . ." (49 U.S.C. preceding Sections 1, 301, 901, and 1001).

Accordingly, if a parity of rates causes unreasonable charges or "unjust discrimination, undue preferences or advantages," the National Transportation Policy, instead of being promoted, is actually being defeated. In insisting upon parity in the circumstances of this case, the appellants are really saying that in the interest of national defense they should have rates lower than necessary to meet the competition and an undue and unreasonable advantage. If ore can be brought from Labrador to Philadelphia for, say, 20 cents less than to Baltimore, will anyone say that the "national safety" would be "seriously threatened" if the rail rate from Philadelphia were 20 cents higher than from Baltimore? None of the appellant steel companies can possibly require more than an equalization of through transportation costs, and if this is brought about, the tremendous ore unloading facilities at Philadelphia — which the Pennsylvania Railroad started to erect in 1951 *or two years before it even filed the parity rates from Philadelphia here involved* — should not wither on the vine.

Sixth. The appellants say with respect to that part of the remand order which would require the Commission to consider ocean transportation costs that the Commission "did not consider this as of controlling importance in reaching its ultimate conclusion,"[17] and the Commission itself argues that it was "not required to disallow the Pennsylvania rates because the rates do not attempt to equalize

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[17] Juris. St. of PRR at 16.

the total transportation costs, ocean and rail, from Labrador to differential territory."[18]

The Commission's findings in this connection were limited to certain facts which, when put together, should mean important advantages in ocean transportation to Philadelphia as compared with Baltimore. But the Commission itself did not find such advantages (except inferentially), or indeed reach any conclusion at all. As correctly found by the District Court (151 F. Supp. at 269):

> The Commission . . . made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore.

And after citing the Commission's finding of differences in ocean distances and its statement "that in some instances there is a cost saving in routing ore to the nearest port 'on a time charter or for an integrated shipper,'" the District Court held that (151 F. Supp. at 277):

> These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore.

The very purpose of the remand of course is to enable the Commission to make up this deficiency and to determine whether a parity of rates from Philadelphia and Baltimore puts Philadelphia at a competitive advantage in disregard of the fact that by the transportation standard Baltimore has the geographical advantage. The railroads may not be under an obligation "to equalize total costs through the North Atlantic ports," but certainly the Commission is under an obligation to determine whether the failure to do so produces rates lower than necessary to meet the competition and a rate relationship unlawful

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[18] Juris. St. of ICC at 15.

under section 3(1). These determinations the Commission did not make, and the purpose of the remand is to have the Commission make them.

Seventh. The appellants say with respect to that part of the remand order which would require the Commission, in reaching a conclusion as to a lawful rate relationship, to take "into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect" that the "records before administrative agencies must at some point be closed," and "no compelling reason has been advanced by the court to reopen the record in this instance."[19] The appellant Delaware River Port Authority observes that "there is nothing to indicate that such statistics, if produced, would alter the basic picture reflected by the statistics already of record and relied upon by the Commission,"[20] and the Labrador ore interests argue that the "prospective tonnages of foreign iron ore importations with respect to the ports of Philadelphia and Baltimore" are already the subject of "explicit, clear-cut and unequivocal findings."[21]

The parity rates from Philadelphia and Baltimore became effective February 19, 1954, and the record in this proceeding closed December 21, 1954. Consequently, so far as this record goes, the experience under parity is limited to 10 months in 1954 — a brief period during which the movement had only begun to gather momentum. From Labrador, for instance, there was no movement prior to 1954, and the first shipments in that year did not materialize until August when the season was well along. At that time the rate of production was only a fraction of antici-

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[19] Juris. St. of PRR at 16-17. Cf. Juris. St. of N. Y. appellants at 20.

[20] Juris. St. of Delaware River Port Authority, at 9.

[21] Juris. St. of Labrador ore interests at 19.

pated levels. Even so, the record shows that the 1954 tonnage through Philadelphia under a parity of rates to the 17 points in differential territory leapt forward and gave every indication of far out-pacing Baltimore in the years ahead.

But as to what has happened under parity since December, 1954, the record of course is silent. The Commission took almost two years to reach its decision on further hearing, and the interval since has been taken up with the proceedings in court.

Clearly, evidence as to what parity has meant — as the volume of import iron ore has been increasing to anticipated levels — is important on the issue of a lawful rate relation. On the question of whether the longer-haul port of Philadelphia has gained a competitive advantage under a parity of rates, a showing as to its share of the competitive traffic is certainly relevant. The District Court specifically provided that the parity of rates should remain in effect *pending* the Commission's further inquiry. The fervor with which the appellants resist a disclosure suggests that it would not support a parity of rates.

II.

The Lack of Substance in the Questions Put by Appellants Concerned with the Rate from New York

Instead of an order of remand, the District Court, as we have seen, enjoined the Commission's order approving the same rates from New York as from Baltimore.

First. The different treatment of New York is the principal question raised by the United States on this appeal. The Solicitor General says:

> Assuming, *arguendo*, that the district court correctly held that the Commission's findings were inadequate to justify the elimination of the differential from New York, we think that the court nevertheless erred in vacating the order disapproving such rates, without giving the Commission an opportunity to make further findings on remand.[22]

And then, after pointing out the further findings required of the Commission in the remand of the Philadelphia rates (as dealt with in the foregoing section of this motion), the Solicitor General says further:

> We submit that the court similarly should have remanded to the Commission to make such findings with respect to the port of New York. The failure to do so seems explicable only on the theory that the court took a narrow view of the extent of the Commission's powers. In our view, the disparity in distances between the ex-Baltimore and ex-New York movements does not in and of itself preclude equality of rates. And if further findings are required (as may well be the case) to demonstrate a need for eliminating the differential, it is erroneous to cut off the administrative process.[23]

It is submitted that this question as raised by the United States lacks substance.

In this proceeding the only action taken by the Commission was to approve as "just and reasonable" under Section 15(7) a reduced rate from New York which was the same as the rate from Baltimore. The Commission did not prescribe parity as a principle to govern future rate-making, nor did it make any findings which would preclude rates on different levels if justified by a different record.

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[22] Juris. St. of Dept. of Justice, at 5.
[23] Ibid.

Accordingly, the effect of the District Court's judgment is to preclude from New York the same rate as from Baltimore on the basis of the present record. In no way, however, would the order of the District Court operate to prevent the New York appellants, if they should want to try again, from seeking to justify on a different record the same rates which, on this record, the District Court enjoined. Nor would the order of the District Court stand in the way of the Commission's reopening the proceeding either on petition or by its own initiative. Thus a continuance of the administrative process is not cut off. On the contrary, its continuance depends on the initiative of the New York appellants in bringing another proceeding under Section 15(7), or action by the Commission in continuing the present proceeding.

Second. It is not to be inferred from the foregoing that the action of the District Court in enjoining the parity rate from New York lacks support. On the contrary, the plain truth is that the Commission approved parity rates from New York without any finding as to whether they would be lower than necessary to meet the competition or create a lawful relationship under the provisions of Section 3(1). The result is that the Commission's action is void for lack of basic findings, and the District Court took the proper course in entering an injunction. *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, 505. As stated in the cited opinion by Mr. Justice Cardozo for an unanimous Court:

> This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States*, 282 U.S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U.S. 454. "In the absence of such findings, we are not

> called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." *Florida v. United States, supra.* Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning.

It is elementary that when the appellant New York railroads proposed from New York the same rates as from Baltimore, an important part of their statutory burden of proof was to justify the proposed rates as not lower than necessary to meet the competition and as creating a lawful relationship under the provisions of Section 3(1). A showing of reasonableness *per se* would not be enough. As stated in *Kenny v. United States,* 103 F. Supp. 971, 974:

> The statute reserves to the carrier a primary right to establish tariffs but vests in the Commission the authority to determine their "lawfulness." *United States v. Chicago, M., St. P. & P. R. Co.,* supra, 294 U. S. 506 and 510, 55 S. Ct., 462; *Skinner & Eddy Corp. v. United States,* 249 U. S. 557, 564, 565, 39 S. Ct. 375, 63 L. Ed. 772; *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U.S. 88, 92, 33 S. Ct. 185, 57 L. Ed. 431. This power is specifically defined by Section 15(7), supra. The burden is upon the carrier to prove not only that the proposed tariffs are "just and reasonable" but also that they are lawful. Ibid. The proposed tariffs may be approved as "just, reasonable and not unlawful" only if they meet the statutory requirements.

This requirement is apparently[24] appreciated by the New York appellants, and what do they point to as evidence that New York rates on the same level as from Baltimore represent a lawful relationship? They quote the follow-

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[24] We say "apparently" because the New York appellants devote much of their statement to distinguishing between rates which, as here, are proposed by carriers and rates which can be required by the Commission, and they say that "The district court's erroneous conclusion stems largely from this failure to understand the difference

ing extract from the Commission's report (299 I.C.C. 208) as dispositive:

> It has long been recognized that carriers may, *within lawful bounds*, so adjust their rates as to secure a fair proportion of the traffic, as well as reasonably to foster the ports which they serve. That appears to be what the respondents here have attempted to do. (Emphasis supplied by New York appellants).

Conceding, *arguendo*, that what the New York railroads "attempted to do" was to make rates from New York "within lawful bounds," the question which the Commission leaves undecided is, did the New York railroads succeed in doing so? The Commission's report will be searched in vain for a clear finding on the crucial issues. The Commission did not even go through the form of finding compliance with the provisions of Section 3(1). The only sentence in the report which remotely concerns the relationship created by the same rates from New York as from Baltimore is that (299 I.C.C. at 209):

> the iron-ore tonnage through Baltimore will probably continue to increase even though rate parity is maintained at Philadelphia, *and this appears to be a reasonable assumption with rate parity also at New York.* (Italics supplied).

But a proper rate relationship cannot depend alone upon an "assumed" increase in tonnage at Baltimore. Certainly

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between voluntary and compulsory action." Juris. St. of New York appellants, at 19.

It is of course true that in meeting competition a carrier may publish a lower rate level than the Commission can require, but this does not mean that there is any relaxation of the rules against rates lower than necessary to meet the competition under Section 1(5) or rates which are unduly preferential or prejudicial under Section 3(1). If anything, the publication of carrier-made rates to meet competition are subject to more exacting tests in these two respects than ordinary rates. *Iron and Steel to Iowa, Minnesota, Michigan and Wisconsin*, 297 I.C.C. 363; *Petroleum Products in California and Oregon*, 284 I.C.C. 287.

this "assumption" which the Commission accepts as "reasonable" falls far short of constituting a clear finding as to a proper relationship in rates. Again the language of Mr. Justice Cardozo, speaking for an unanimous Court in *United States v. Chicago, M., St. P. & P. R. Co.*, supra, at 510-511, is appropriate:

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. * * * The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86; *Florida v. United States*, 282 U.S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

Clear and unequivocal findings were particularly important in the case of the New York rates. For here, the parity of rates which the Commission approved involves the setting aside of a distance disadvantage for New York of 188 miles over short tariff routes (151 F. Supp. at 267) — a distance disability of about 50 percent. And yet the Commission's report on the New York rates makes no mention of Section 3(1) and includes no findings thereunder. The Commission's order therefore is plainly void and the proper subject of an injunction.

Third. The New York appellants say that "Were the court's decision to be reversed with respect to New York's continuation in the case, the Commission would presumably be directed to make the same specific findings as to New York" as required by the District Court in the case of

Philadelphia, and they argue that "Even if the court had such power [of remand], the additional findings requested would be of little or no value and would not justify the remand."[25] While these appellants acknowledge that "most of the ore" to the Youngstown area where their parity rates would apply "originates in Labrador," they say that this ore is tied to other ports, and "If the New York carriers are to get any sizeable volume of imported iron ore traffic it will probably have to come not from Labrador but from countries where New York is at an ocean distance disadvantage."[26] This position raises two questions which were not considered in the Commission's report: first, under a parity of rail rates, why would not New York's ocean advantage of 576 nautical miles for the round-trip be controlling in the routing of Labrador ore to Youngstown? And second, if New York must look elsewhere for import iron ore to move to Youngstown, where will it look when, for the most part, Youngstown has ownership rights in Labrador ore through the Iron Ore Company of Canada and enjoys what amounts to preemptive rights?

By the transportation standard New York has no possible claim to a parity of rates, and it is elementary that this standard will not be set aside to give New York, as the long-haul port, a competitive advantage.

Fourth. The appellant Commission, after pointing out that iron ore cannot move through a port without an unloading facility, says "that no iron ore unloading facility will be built at New York unless there is a parity of rates," and

> "From its over-all knowledge of the transportation system of the country, and particularly the facilities needed for unloading and moving iron ore, the Com-

[25] Juris. St. of N. Y. appellants at 20, 25.
[26] Id. at 23.

mission was in a position to conclude that it would be in the interests of national defense to have more than one North Atlantic port equipped for the importation of iron ore."

Contrary to the implication in this statement, there are already three North Atlantic ports equipped for the importation of iron ore, viz., Philadelphia, Baltimore, and Hampton Roads. Moreover, these ports will only be used, in reaching the territory here in question, in keen competition with the St. Lawrence — which route provides a number of additional unloading facilities at the several Lake Erie ports. To suggest that still another unloading facility at New York is required in the interest of national defense is untenable.

There is no testimony in this record from any representative of the national defense establishment, or any user of iron ore, that parity rates are required from New York. The Labrador ore interests are wholly disinterested. They do not even join in the appeal from the order of the District Court which enjoins the New York rate.

National defense is one of the objectives of the National Transportation Policy. But this policy provides no separate standards for judging the lawfulness of rates under the Interstate Commerce Act, let alone standards which may be given over-riding effect. In fact, unless and until a parity rate can be found to be no lower than necessary to meet the competition and to create a proper rate relationship, such a rate contravenes the National Transportation Policy. For as we have seen, this policy provides that, in administering the Interstate Commerce Act and in reaching its objectives, including a transportation system adequate for national defense, the Commission shall

"encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages . . .".

Conclusion

The District Court, in holding that the Commission's order was not based on adequate findings, was clearly right. This ground sustains the decision on appeal. The motion to affirm should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 463

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 464

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 465

ERIE RAILROAD COMPANY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 466

THE NEW YORK CENTRAL RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 467

ARMCO STEEL CORPORATION, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 468

DELAWARE RIVER PORT AUTHORITY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 473

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

The appellees Maryland Port Authority and Baltimore Association of Commerce move to affirm on the ground that the questions presented are so unsubstantial as not to need further argument.

STATUTES INVOLVED

Judicial Code Sec. 1336, 28 U.S.C. Section 1336—

> "Interstate Commerce Commission's Orders — Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

QUESTIONS PRESENTED

1. *Is there a lack of basic findings to support the conclusions reached by the Interstate Commerce Commission in favor of a parity of rail rates on imported iron ore from New York, Philadelphia and Baltimore, respectively, to the seventeen destinations?*

The District Court held that essential findings are lacking, and the Jurisdictional Statement filed herein by the Solicitor General concedes (page 5) that such "may well be the case." We think the lack can be demonstrated without further argument, in a short statement, and we attempt to do this below. If there is such a lack of findings, this is adequate ground for the District Court's setting aside the Commission's order, and other issues listed by the various parties, except those that question the relief granted by the District Court, relate to alternate grounds of decision that are not reached.

2. *Was it an abuse of the District Court's discretion to enjoin the New York rates, instead of remanding to the Commission as it did in the case of the Philadelphia rates?*

The power to enjoin an order of the Commission not based on adequate findings is clearly conferred on the District Court by statute, 28 U.S.C. Sec. 1336. This court has sustained injunctions issued against orders of the Inter-

state Commerce Commission on the ground that there were not adequate findings. *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935); *Interstate Commerce Commission v. Mechling*, 330 U.S. 567 (1947); *U. S. v. B. & O. R. Co.*, 293 U.S. 454 (1935). In the present case the setting aside of the Commission's order approving the New York rates, instead of remanding, is a matter of procedural detail and not of substance. The order does not prevent the New York carriers or the Commission from justifying the same or any other rates in a new proceeding, on the same evidence as if the case had been remanded. Meanwhile the *status quo* is preserved, as it should be if necessary findings are lacking. The New York rates, on which no traffic has ever moved, and which cannot move any traffic until an expensive unloading facility has been commenced and completed, are prevented from going into effect until they are justified. The Philadelphia rates, which are in effect and on which great volumes of traffic are moving, are left in effect until the Commission can make the necessary findings. This is the shaping of equitable relief to avoid waste and is not inconsistent, as the Commission's Jurisdictional Statement calls it (page 19), and it is not a discrimination based, as the Solicitor General appears to consider it, merely on the fact that New York is more distant than Philadelphia from Central Territory.

STATEMENT

The District Court is Clearly Right in Holding that the Commission has Failed to Make Essential Findings.

The issue before the Commission was the proper relationship of railroad rates that would result in fair and nonpreferential competition for the traffic in iron ore imported by five steel companies, Armco Steel Corporation, National Steel Corporation, Republic Steel Corporation,

Wheeling Steel Corporation, and Youngstown Sheet and Tube Company, to furnaces at seventeen points in Central Territory. Superficially the issues were whether the respective carrier-initiated rates were just and reasonable. But the bone of contention between groups of carriers was the relationship that should exist between their rates, and the effect and purpose of the Commission's decision were to sustain the parity relationship desired by the New York and Philadelphia carriers and to strike down the differential relationship desired by the Baltimore carriers. It should be briefly stated how this issue arose.

Bethlehem Steel Corporation and United States Steel Corporation have been the principal consumers of iron ore imported from foreign sources, and in the years through 1950 about three-quarters of all the iron ore imported into the United States was consumed at a single plant of Bethlehem Steel Corporation located at Sparrows Point, outside Baltimore's harbor. Lesser volumes moved inland as far as Pittsburgh, but none moved west of there. The reason was that cost of transportation, which is a large fraction of the cost of iron ore delivered at the mill, made foreign iron ore more expensive than domestic ore except near the coast.

The result was that Bethlehem and U. S. Steel, the major companies that have plants at and near the seaboard, were the first to acquire and develop great foreign sources of iron ore. The production of these sources went almost entirely to these two companies and was consumed by them mainly at tidewater and none west of Pittsburgh. By 1950 the economics affecting the use of foreign iron ore were changing. Republic then had an iron ore development in Liberia, and this resulted in a rail movement to Ohio that was about half a million tons a year in 1953 and 1954, but,

with this exception, the five steel companies named above as having mills at the seventeen points had no foreign iron ore developments.

In 1950 it became known that these five companies, together with M. A. Hanna Company, had formed Iron Ore Company of Canada as a joint venture to develop iron ore deposits in Labrador and to consume the production in proportion to their respective interests. This impending movement, which had barely begun when the record in this case closed, generated the present controversy. The Commission estimated that by 1956 the Labrador movement would amount to 10,000,000 tons per year, about half of all the iron ore that would be imported into the United States, and that 5,000,000 or 6,000,000 tons of ore from Labrador would pass annually through the North Atlantic ports en route to Central Territory.

In response to this news the carriers serving Philadelphia published iron ore rates to the seventeen points at the same level as the rates from Baltimore to those points, and the New York carriers published equal rates to the seven of these points that their rails reached. The Baltimore carriers protested these rates on the ground that they ought to be no lower than they would be under the port-differential adjustment which for many decades had fixed freight rates to Central Territory according to a formula which, applied to iron ore moving to Youngstown, would make the rate from Baltimore twenty cents per ton under the rate from Philadelphia and sixty cents under the rate from New York. As an alternate move the Baltimore carriers published a new rate twenty cents below the protested Philadelphia and New York rates. This rate was in turn protested by the New York and Philadelphia carriers, and the Pennsylvania Railroad published a new rate from Philadel-

phia matching the Baltimore reduction. All these rates were suspended, and this proceeding commenced.

The findings of the Commission show that by the application of normal transportation considerations, leaving aside for the moment the adjustment of rates to foster competition, the Baltimore carriers were plainly entitled to lower rates, and as compared with New York the disparity of earnings that would result from equal rates was extreme. We will not dwell on this point, because the findings make it too clear to require argument. It is true that the Commission found the New York rates just and reasonable because they would earn out-of-pocket costs and found the proposed lower Baltimore rates, which earned far more, not just and reasonable because they would not bear a full share of all transportation costs. But this conspicuously arbitrary use of widely differing standards was obviously to force a result reached on other grounds. These are to be inferred from the Commission's statement that it is desirable in the interest of shippers and national defense to foster the development of more than one iron-ore port. The Commission further indicated its conclusion that the New York and Philadelphia carriers must have rates to the seventeen points equal to the Baltimore rates in order to compete for the traffic. It did not say this clearly or directly, so that even this ultimate conclusion is obscure, but that seems to be the only reasonable interpretation of the Commission's statement that the New York and Philadelphia rates appeared to have been fixed in an effort to secure a fair proportion of the traffic.

But we do not need to speculate as to the rationale of the decision of the Commission, since it is perfectly clear that without the conclusion that the New York and Philadelphia carriers need parity in order to compete with the

Baltimore carriers for this traffic, no legal basis exists upon which the action taken by the Commission in these cases can be supported. Thus, the argument derived from the supposed need in the interest of national defense of additional ports equipped to handle iron ore simply is not reached unless the need for parity in order to compete is first demonstrated. If New York and Philadelphia, because of other advantages, can obtain a fair share of this business without disregarding Baltimore's inland position, then obviously no question of national defense can arise. Likewise, the need for parity in order to obtain a fair share of this traffic must be shown before the Commission can reach the question whether the disregard of the transportation standard involved in the imposition of inherently unequal and discriminatory rates on Baltimore can be justified. *Scandrett v. U. S.*, 32 F. Supp. 995 (D. Ore. 1940), affirmed *per curiam* 312 U.S. 661 (1941); *All Freight From Eastern Ports to the South*, 245 I.C.C. 207, 222 (1941). It has long been recognized that localities are entitled to the benefit of their natural geographical advantages, at least unless countervailing considerations are shown to exist justifying their denial. *Texas & Pacific Ry. Co. v. U. S.*, 289 U.S. 627, 637 (1933); *U. S. v. Illinois Central R. Co.*, 263 U.S. 514 (1924). Finally, it is clear that any proposed rate must not be unduly preferential or discriminatory as between ports, regions or localities. *New York v. U. S.*, 331 U.S. 284 (1947). Where, as is the case here, ports seeking parity in disregard of normal rate-making standards are shown to have special advantages (in this case notably proximity to the principal source of the traffic) a showing of need for parity in order to obtain a competitive share of business is clearly essential, otherwise prejudice and preference would almost have to be presumed. For all of these reasons, we think that it is clear that the Commission must have founded its action in approving the rates proposed by the

New York and Philadelphia carriers and disapproving the lower rates proposed by the Baltimore carriers on a conclusion that such action was necessary in order to permit the more northerly ports to compete for a fair share of this traffic.

This conclusion that the New York and Philadelphia carriers need parity to compete with the Baltimore carriers for this traffic is based on no findings but, on the contrary, is in the teeth of findings pointing to the opposite conclusion. The findings show that the traffic that moves to the seventeen points in Central Territory is coming mainly from Labrador. The findings state that New York and Philadelphia are nearer than Baltimore to Labrador by sea by round-trip distances of 576 miles and 310 miles respectively. The Commission expressly finds that integrated shippers (those owning the vessels that transport the ore) "might" save cost and time by moving the ore to the port nearest the point of origin. Representatives of the five steel companies and of Iron Ore Company of Canada, the shippers involved, testified unanimously and unequivocally that their choice of a port would be governed by the lowest overall cost of transportation from Labrador to the consuming furnace and would be further governed by an effort to make the maximum number of round trips with the ore-carrying vessels because of the short duration of the Labrador season and because of their great investment in those vessels.

These findings require the conclusion that if the rail rates to the furnaces are the same for the long haul from New York as for the much shorter haul from Baltimore the result will not be fair competition but an allocation of the traffic away from Baltimore. If there are other factors that refute this conclusion the Commission has failed to

make any findings to that effect. The District Court therefore found that there is no basis in the findings for the Commission's conclusion that the New York and Philadelphia carriers need parity in order to compete.

If the Commission's report is searched for a finding responsive to this primary issue there can be found only the statement that it is persuaded that "the iron ore tonnage through Baltimore will probably continue to increase" despite parity rates. This statement appears to reflect statistics cited throughout the opinion showing, for various periods, receipts at Baltimore as swelled by the great and growing consumption of iron ore at Sparrows Point. But if the uncertain inference is made that this statement means that Baltimore's tonnage of westbound ore will increase, it hardly serves as an answer to the issue, since the rail movement in question had hardly begun when the record closed, and to say that the tonnage through Baltimore would increase is a Delphic answer to the question whether parity rates would afford a basis for fair competition.*

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* A word should be said of statistics showing that Baltimore has received Labrador ore after the Philadelphia rates went into effect. The total was substantial, but it shrinks to a degree that shows a four-to-one advantage of Philadelphia under parity rates if adjustment is made for the tonnage which, as found by the Commission, was consigned to Philadelphia but diverted to Baltimore because of a strike, and for that part of the tonnage destined for furnaces west of the seventeen points. To these western points the New York and Philadelphia carriers have voluntarily maintained noncompetitive rates, higher than the Baltimore rates by margins many times greater than any differential in issue. This is a temporary concession of traffic to the Baltimore carriers that shows nothing about the effect of either parity or a reasonable differential. Of 412,817 tons of Labrador ore moved through Baltimore to destinations west of Pittsburgh, 113,210 tons had been diverted by the strike and 114,318 tons were in cargoes forced to Baltimore by the noncompetitive rates. This leaves Baltimore 185,289 tons affected by parity rates against 631,730 tons at Philadelphia, which total would have been 744,940 tons but for the strike. (Figures are for the period August 1 — December 5, 1954.)

The District Court was, therefore, clearly right in holding that the Commission has not made findings to show how it reached its apparent conclusion that competitive considerations required it to disregard normal rate-making standards. Did the Commission decide that the immense receipts at Sparrows Point would justify an allocation to other ports of the iron ore that moves to Central Territory? This lurking suggestion is never clearly articulated, and we think that if it had been articulated the Commission would have recoiled from it. Did it decide that an allocation of all the Labrador ore to the more northern ports is necessary to give them sufficient volume to support the kind of facilities that national defense or some other public interest requires? There is no such finding, and it is not consistent with what is said about fair competition.

The lack of findings essential to the Commission's conclusion is sufficient ground for affirming the District Court. As Judge *Learned Hand* has stated in *B. & O. R. Co. v. U. S.*, 22 F. Supp. 533, 537 (N.D.N.Y., 1937):

> "Their conclusion may have been in fact justified, but we have no way of knowing it, and either we should have to abdicate our duty to enforce the law as we understand it, or we should have to substitute our own conclusions upon matters which only the Commission is fitted to consider. The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. * * * What findings are 'basic' is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside."

The lack of findings is too manifest to require further argument. We call the Court's attention to the Solicitor General's acknowledgment, page 5 of the Jurisdictional

Statement filed on behalf of the United States, that the necessity for further findings "may well be the case." We also call attention to the opinion of the United States District Court for the District of Massachusetts in an appeal from an order of the Commission, made in the same proceeding and on the same record as the orders involved here. *Boston and Maine Railroad, et al. v. U. S., et al.*, ... F. Supp. ..... (1957, Civil Action No. 56-928-A). The District Court, in an opinion by Judge *Magruder*, affirmed the Commission's disapproval of parity rates from Boston as not compensatory. Speaking of the issue that would be raised if it were not for this ground for disapproving Boston rates equal to the Baltimore level, Judge *Magruder* stated that the Commission would then have to take into account "the assured prospect that by far the greatest amount of import ore will in the future come from Labrador, a point of origin giving the port of Boston a geographical advantage of sea transportation." The Commission's report neither denies the importance and relevance of this prospect — it confirms that it is both important and relevant — nor shows how it dealt with it.

CONCLUSION

The District Court, in holding that the Commission's order was not based on adequate findings, was clearly right. It is respectfully submitted that this ground sustains the decision on appeal, and other issues listed by the various parties need not be considered.

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Supreme Court of the United States

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No. 463

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 464

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

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No. 468

DELAWARE RIVER PORT AUTHORITY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 473

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION OF CANTON RAILROAD COMPANY TO AFFIRM

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MOTION TO AFFIRM

The Appellee, Canton Railroad Company moves to affirm on the ground that the question presented is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Were the decisions of the Interstate Commerce Commission regarding iron ore rates from the North Atlantic ports supported by adequate findings?

STATEMENT

The relevant facts are adequately set forth in the Motion to Affirm of The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, and we adopt the Statement of Facts of those Appellees.

ARGUMENT

While the facts involved in the controversy over iron ore rates from the North Atlantic ports to differential territory are complex, the issue on this appeal is simple. The District Court, in reversing the decisions of the Interstate Commerce Commission, properly considered only the restricted question of whether the Commission followed proper procedures in reaching its decision. The Court concluded that the Commission did not make the essential findings on which to base its ultimate determinations. We believe this conclusion to be inescapable and readily demonstrable.

The I.C.C. decisions in this case are glaring examples of a predominant tendency on the part of the Commission to tailor its opinions with a view towards rendering them invulnerable on appeal rather than towards actually dealing with the disputed matters and resolving them in accordance with the evidence. Decisions which announce the only feasible rule — that the Courts are to restrict their interference with the operation of the administrative process and to reverse the determinations only where administrative bodies have not considered all the relevant factors

— have been seized upon as a basis for opinions which fail to come to grips with the problems before the I.C.C. but contain perfunctory references to practically every conceivable factor brought before the Commission.

In this case, for example, many pages in the Commission's reports are devoted to detailing *the contentions* of the various parties. Understandably, these contentions are often contradictory on matters of substantial relevance to the issues before the Commission. The Commission carefully avoids findings of fact which resolve such contradictions and contents itself with a simple conclusion that the rates in question are or are not shown to be just and reasonable.

Such statements of the arguments advanced by the contending parties and final announcements of decision omit any indication of what the facts actually were on which the Commission based its determinations.

It is an inescapable conclusion that in this particular proceeding the Interstate Commerce Commission early decided that there should be an analogy drawn, for purposes of rates for iron ore imported through the North Atlantic ports, to the *voluntary* system introduced and maintained by the railroads for domestic iron ore travelling through the Great Lakes and that, consequently, it was desirable to have equal rail rates, regardless of distance differences, from several North Atlantic ports to the consuming points in differential territory.

Facts presented in substantial volume by opponents of this objective, those interested in the continued welfare of the Port of Baltimore and of the railroads serving her, demonstrated the inappropriateness of the analogy and particularly the impropriety of a *compulsory* parity of rates to which the Baltimore carriers, unlike those serving Great

Lake ports, were unwilling to accede. Since those facts created awkward hurdles to a pre-determined conclusion on which the Commission had set its mind, it stated what were facts which could not be swallowed merely as contentions of the parties, and simply said yes or no to rates without explaining why these awkward facts could be ignored.

If such a technique may be employed by an administrative agency and it can justify any result reached without explanation simply by stating the "contentions" of all the parties and pretending that it somehow considered all such contentions, no protection against arbitrary administrative action remains. We respectfully submit that the District Court was right in refusing to sustain a decision which, as to Philadelphia, was not supported by adequate findings and which, as to New York, flew in the face of the only factual findings which could have been made.

The simple unavoidable truths, the consequences of which the Commission sought to escape by its dubious method of opinion preparation, are these:

1. The primary and indeed only substantial source of foreign ore which will be subject to competitive rail routing will be that originating in Labrador.* All substantial quantities of iron ore originating elsewhere, as, for example, in South America or Sweden, are controlled or imported by either the Bethlehem Steel Company or by the United States Steel Company. Each of these concerns has a tidewater plant, the former at Sparrow's Point in the Port of

* Liberia ore, for which choice of rail routing may be determined by rate relationships is expected to be imported at a rate of about 500,000 tons per year, as compared to estimates of 10,000,000 tons annually for Labrador ore. Liberia is closer by sea to New York and Philadelphia, than Baltimore, so that considerations dealt with in paragraph 3 below apply with respect to it as well.

Baltimore. the latter at Morrisville in the Port of Philadelphia. Economies through controlling unloading operations and through blending ores from various sources so outweigh rail rate considerations that these two companies will import through their tidewater plants regardless of rail rate differences. Thus, for example, Bethlehem Steel imports iron ore destined for its plant in Bethlehem, Pennsylvania, through Baltimore, although the rail rate from Philadelphia to Bethlehem is 53.8 cents per ton less than the rate from Baltimore. Overall iron ore importation statistics for the port of Baltimore apparently relied upon by the I.C.C. were irrelevant to the issues before that body because no elimination was made of tonnages consigned to the Sparrows Point plant and of other tonnages not subject to competitive considerations in choice of rail routing.*

2. Iron ore may be exported from Labrador only during a limited portion of the year. The ore carriers principally employed in the North Atlantic service for such carriage are owned or controlled by the consuming companies owning the Labrador deposits and their partner in that venture, the M. A. Hanna Coal & Ore Company. Speedy turn-around of the vessels involved is of prime importance and the shippers will inevitably prefer the port with the

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* Imported ore is sometimes consigned to other points in differential territory than the 17 here involved. Because the New York and Philadelphia railroads have permitted their iron ore rates to such other points to remain far above the usual differential from the Baltimore rates, shippers to such points inevitably route through Baltimore not only full cargoes to such other points, but cargoes destined partly to such points and partly to the 17 points as well. If rates to such other points had been reduced to show the proper relationship to Baltimore rates, tonnages consigned in whole or in part to such points would be relevant to the issues here. No such event occurred, however, so consignments to such points were not properly to be considered as subject to competitive routing depending on rates to the 17 points.

shortest sailing time from Labrador, assuming equal rail rates for the overland haul to the destinations in differential territory.

3. Round-trip sailings from Labrador to New York and to Philadelphia would require two days less time in the case of New York and 21 hours less time in the case of Philadelphia than a round-trip from Labrador to Baltimore. Operating charges of American flag ore carriers were estimated to be $2,000 per day.

4. Overland distances from Baltimore are significantly less than those from Philadelphia and New York, to the extent that rates related on the normal differential heretofore prevalent would create greater earnings for Baltimore railroads than for the railroads serving New York and Philadelphia. The existence of the differential rate structure for the North Atlantic ports for nearly 80 years prior to these proceedings bears excellent witness that distances between the three ports here involved substantially affect the cost of hauling to points in differential territory.

5. Experience with shipments of iron ore from Labrador for even the limited season of 1954 which was the only one for which statistics were available at the time the record closed demonstrated that, on a rail rate parity, Philadelphia was distinctly preferred by shippers from Labrador and, by reason of rail rate parity and ocean shipping advantage, Philadelphia was not merely competing for such traffic with Baltimore, but dominating it. Eliminating shipments to Bethlehem Steel Corporation, which were wedded to the Sparrows Point plant in Baltimore, and disregarding certain tonnage originally consigned to Philadelphia but diverted to Baltimore because of a strike in the Philadelphia port, 299,607 gross tons of Labrador ore were imported through Baltimore. For Philadelphia, in-

cluding the strike-diverted cargoes, the Labrador imports were 744,940 gross tons, none of which was consigned to the Morrisville plant of U. S. Steel. 114,318 gross tons of the Baltimore total were consigned to differential territory beyond the seventeen points involved in this litigation.

The plea of iron ore consumers that they should have more than one port of entry is the basis on which the I.C.C. reached its fast conclusion that parity rates should be compelled. We do not quarrel with the desire of the ore consumers to the extent that rates are adjusted so that *over-all*, from point of foreign origin to point of destination in differential territory, the shipment costs for iron ore are the same regardless of which port of entry is employed. Under such circumstances, but only under such circumstances, can Baltimore fairly compete as one of several alternate ports of entry available to the shippers. While superficially the idea of parity rates may convey some impression of equality among the competing ports, as obviously it did for the Interstate Commerce Commission, any thoughtful consideration, such as the Commission refused to give, inevitably reveals that such parity rates actually create competitive inequalities between the ports. Where there are ocean transportation considerations which favor one port over another, unless they are counterbalanced by differences in the overland rate the port with disadvantage from an ocean point of view is bound to come out second best in competition for the trade.

Baltimore's disadvantage vis-a-vis New York, in so far as steaming distances from Labrador are concerned, is so evident and undeniable that a parity in rail rates, regardless of the overland distances, manifestly cannot create equal opportunities of competition. When this consideration is added to the great disparity in Baltimore's favor of

overland distances to differential territory, there is no other alternative to the conclusion reached by the Court below that rates from New York exactly equal to those from Baltimore go lower than is necessary to meet competition. Once that is realized, it further inescapably follows that the I.C.C. was in error when it made a pretense of determining the reasonableness of the rates from the two ports as though they were independent questions and found a new New York rate reasonable, but struck down as unreasonable a Baltimore rate 20 cents less for 112 miles* less in haul. The earnings which the "unreasonable" Baltimore rate would produce were substantially greater than those under the "reasonable" New York rate. To Youngstown, Ohio, the typical destination, a $2.71 rate from New York would produce 34.3 car-mile cents and 5.5 ton-mile mills. A $2.51 rate from Baltimore would produce 41.2 car-mile cents and 6.6 ton-mile mills. (The Philadelphia $2.71 rate, 20¢ higher than the Baltimore rate, also would produce lower earnings: 39.6 car-mile cents, 6.4 ton-mile mills.)

The lower court was, therefore, correct in concluding that it was unequal and arbitrary for the Commission to uphold in one breath a $2.71 New York rate and strike down a $2.51 rate from Baltimore. The approval of the New York rate would require the approval of the lower Baltimore rate, if the Commission's action was to be proper. There was, consequently, no basis for upholding the decision approving the New York rate when the decision was grounded on a belief that parity should be compelled between the ports. The court correctly concluded that on the only reasonable findings which could be made from the

* This distance disparity is based on short line comparisons. If short tariff distances are compared, the distance from Baltimore is less by 188 miles.

evidence submitted to the Commission, New York could fairly compete with Baltimore, despite some differential in the rates reflecting the advantage ocean-wise of New York and the shorter distance from Baltimore.

In the case of Philadelphia, it is our belief that the same considerations should have led the court to conclude that Philadelphia could also compete with Baltimore although the rates were differentially related. However, the court concluded that here further study should be made by the Commission. From this we gather that the court believed that, as a matter of degree, perhaps the lesser ocean advantages and land distance differences between Philadelphia and Baltimore might justify a differential rate at less than the historic 20 cents per ton. In this connection, the court was faced with the problem of upsetting a *status quo*, a parity rate which had gone into operation from Philadelphia despite the pendency of these proceedings. We confidently expect that on further consideration by the Commission, in view of the compelling nature of the evidence, it will agree that a differential rate structure creates the desirable equal competitive situation between Baltimore and Philadelphia.

The District Court has correctly exposed the principal fallacy underlying a conclusion that equal rates are justified between Baltimore and Philadelphia. The Commission apparently (although again its failure to make definite findings renders determination of just what it relied on difficult) gave weight to the Pennsylvania Railroad's argument that its actual hauling route from Philadelphia was only eleven miles greater than its actual hauling route from Baltimore. The fallacy in this argument lies in the fact that the Pennsylvania is the short line, the most direct route, from Philadelphia to differential territory, while it

is the most circuitous from Baltimore. Comparison of its Philadelphia distance with the short line distance from Baltimore makes the disparity forty-six miles.

It is obvious that between fixed points of origin and destination, for competitive reasons, differences in railroad distances are to be ignored. Thus, *from Baltimore*, the Pennsylvania properly is allowed the same rate as the Western Maryland despite the difference of 23 miles (short tariff route comparison, 42 miles by actual operation comparison). Because, however, that distance is disregarded to allow competition between railroads serving Baltimore, it in no way follows, unless boot-strap logic is relied on, that the same distance difference should be disregarded in relating the rates between two different and competing points of origin, Philadelphia and Baltimore. In the latter case other factors affecting competition enter and in this instance those other factors are controlling ones for purposes of determining the reasonableness of parity rates between the ports. Philadelphia has an ocean advantage which Baltimore cannot match if rail rates are identical.

This argument of the Pennsylvania Railroad as to ignoring distances between Baltimore and Philadelphia because of the length of its hauls from the two ports only would support a contention that the Pennsylvania's rate from Baltimore should be higher by the appropriate differential between Philadelphia and Baltimore than the rates of the other Baltimore railroads. Such a result, of course, would not be proper because it would affect the Pennsylvania's ability to compete for the traffic originating in Baltimore. The absurdity of the logical conclusion deriving from the argument, however, demonstrates the absurdity of the argument itself.

In all events, the question of the lawfulness of a parity rate from Philadelphia should abide further consideration of the matter by the Commission and it is hardly a matter at this preliminary stage to take the time of the Supreme Court. After further consideration by the Commission and any action, following such further consideration, by the lower court, it will be time enough to consider the issues with respect to the port relationship between Baltimore and Philadelphia.

In conclusion, we wish to emphasize that experience on the Great Lakes with equal rates from several ports is no justification for the conclusions of the I.C.C. here. There are numerous considerations which make the domestic situation an inappropriate analogy for import ore rail rates. In the first place, the steaming distances in Lake Erie to the various ports differ to such a slight extent that it is far more appropriate to ignore them than to ignore the substantial and, indeed, critical ones between New York and Philadelphia, on the one hand, and Baltimore on the other. Similarly the overland distances are less, and differentials are inappropriate for the same reasons that differentials are not maintained from North Atlantic ports to points in trunk line territory, i.e. east of Pittsburgh. As distances shorten they give way, as the paramount rate making considerations, to terminal costs.

Appellants have cited as a vital consideration language of *Iron Ore Rate Cases,* 41 I.C.C. 181, 215 (1916), relative to the advantages of equal rates from lake ports to steel furnaces. What they refrain from pointing out is the important fact that the Commission was in no way there concerned with the question of inter-port competition. Rather involved was the issue of whether equalization of rates, *on the basis of destination points,* should be main-

tained and extended. The Commission concluded that competitive desires of the various steel producers to equalize raw material costs did not justify the establishment of rates which ignored factors of advantageous geographic location. Having so concluded, the Commission was then faced with the necessity of justifying the existing apparently inconsistent practice, *established by the railroads on a voluntary basis, and in no way attacked in the proceeding*, of lake port equalization. It addressed itself to the question only to explain away an apparent logical inconsistency of the action it was taking as compared to an established practice, not involved in the hearing. Its remarks can in no way be construed as favoring an involuntary port equalization which ignores natural geographic location. The gravamen of the holding in that case was that geographical advantages must be given effect in rate making.

CONCLUSION

The District Court was fully justified in holding that the Commission's order was not based on adequate findings. For this reason, the decision below should be affirmed.

Respectfully submitted,

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No. 464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
et al., Appellees.

On Appeal from the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

The Pennsylvania Railroad Company, Appellant,

v.

The Baltimore and Ohio Railroad Company, et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

In compliance with Rule 13, paragraph 2, of the Revised Rules of the Supreme Court of the United States, appellant, The Pennsylvania Railroad Company, a defendant below, submits its statement disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the District Court entered in this cause on May 22, 1957. Notice of appeal was filed in the District Court on July 19, 1957. Substantial questions are presented by this appeal.

OPINION AND JUDGMENT BELOW

The opinion of the United States District Court for the District of Maryland is reported at 151 F. Supp. 258. A copy is attached hereto as Appendix A. A copy of the final judgment of the District Court, entered May 22, 1957, is attached hereto as Appendix B. The opinions of the Interstate Commerce Commission, dated February 5, 1954 and October 1, 1956, are reported as *Iron Ore from Eastern Ports to Central Freight Association Points,* 291 I. C. C. 527 and 299 I. C. C. 195, respectively. A copy of the order of the Interstate Commerce Commission, dated October 1, 1956, unreported, which incorporates the aforesaid opinions by reference, is attached hereto as Appendix C.

JURISDICTION

This action was brought under 28 U. S. C. §1336 to set aside and enjoin an order of the Interstate Commerce Commission. The decree of the District Court was entered on May 22, 1957, and this appellant filed its notice of appeal in that court on July 19, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Virginian Ry.* v. *United States,* 272 U. S. 658; *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612; *U. S.* v. *Great Northern R. Co.,* 343 U. S. 562.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the order of the Interstate Commerce Commission, insofar as it approved the tariff schedules of The Pennsyl-

vania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953, is not supported by essential basic findings, and in remanding the proceeding to the Commission to make more explicit findings and for further proceedings consistent with the opinion of the Court.

2. Whether the District Court erred in misconstruing the order of the Interstate Commerce Commission and in failing properly to evaluate the Commission's findings, made upon substantial evidence, which support the Commission's ultimate conclusion that the tariff schedules filed to become effective February 9, 1953, on iron ore from Philadelphia are just and reasonable.

3. Whether the District Court erred in failing to respect the doctrines of primary jurisdiction and administrative finality when it made its own findings, including predictions, contrary to those of the Interstate Commerce Commission made upon substantial evidence, and in then remanding the proceeding to the Commission for further proceedings consistent with the Court's opinion.

4. Whether the District Court erred in interpreting and in applying to the evidence in this case the provisions of the National Transportation Policy and of Sections 1(5), 3((1), 14(1), 15(1), 15(7), and 15a(2) of the Interstate Commerce Act.

STATUTES INVOLVED

The National Transportation Policy (49 U. S. C. preceding §§ 1, 301, 901, 1001) and Sections 1(5), 3(1), 14(1), 15(1), 15(7), and 15a(2) (49 U. S. C. §§ 1(5), 3(1), 14(1), 15(1), 15(7), and 15a(2)) of the Interstate Commerce Act, as amended, are set forth in Appendix D hereto.

STATEMENT

This action concerns rates on import iron ore from Philadelphia, Pa., New York, N. Y., and Baltimore, Md., to 17 destinations west of Pittsburgh, Pa., in the Wheeling, W. Va., and Steubenville and Youngstown, Ohio, steel-producing areas. The rates in issue are new rates, occasioned by a change in the movement of iron ore to these destinations.

Prior to the end of World War II, the sole or principal sources of supply for the iron-ore requirements of the steel mills in these areas were mines in northern Minnesota, Wisconsin and upper Michigan, from which the preponderance of the ore moved by rail to Lake Superior, thence by water to lower Lake Erie ports, and by rail beyond. During this period, importation of iron ore through the Atlantic ports was comparatively light and the preponderance of the ore imported was consumed at the eastern seaboard, with some movement as far west as Johnstown and Pittsburgh, Pa.

Because of the dwindling supply of high-grade iron ore from the Lake Superior sources, the steel industry commenced to develop foreign sources of iron ore following the end of World War II, and such sources have been developed in Venezuela, Chile, Liberia, Brazil, Cuba, and Labrador. With the anticipated increase in the volume of imported iron ore, the steel producers at interior points claimed that the rates which had been in effect did not reflect the increased volume of movement and requested the publication of reduced rates from Baltimore.

The first rate change came when, following a study of the situation, the Baltimore and Ohio, Western Maryland and Pennsylvania railroads published, effective October 9, 1950, reduced rates on iron ore from Baltimore to the steel mills in the Johnstown, Pittsburgh, Wheeling, Youngstown and Steubenville areas. At the same time, the rates from Philadelphia to Johnstown and Pittsburgh were

reduced by a like amount to preserve the parity of rates from Philadelphia and Baltimore to Pittsburgh, which had existed for over fifty years. From Baltimore, the rates to Youngstown, a representative point, were made 20 cents per gross ton over the rates to Pittsburgh, but at that time, because of lack of information regarding possible movement, the Pennsylvania Railroad took no action with respect to the establishment of revised rates from Philadelphia to steel mills west of the Pittsburgh area.

The second change in rates took place in 1953, after the steel mills west of Pittsburgh requested the Pennsylvania to reduce its rates on iron ore from Philadelphia to their mills to the level of the rates in effect from Baltimore, so that they might be accorded the same flexibility in the use of ports through which to import this commodity at equal rates as that enjoyed by their competitors in the Johnstown and Pittsburgh areas. As a result of this request, the Pennsylvania proceeded to construct a $10 million iron ore unloading facility at Philadelphia and filed tariffs, to become effective February 9, 1953, by which it proposed to reduce the rates on iron ore from Philadelphia to the 17 destinations in the areas above described to the level of the rates established on October 9, 1950 from Baltimore to those destinations.

At this same time the Erie and New York Central railroads also filed tariffs to become effective February 9, 1953. By these tariffs these railroads proposed to reduce the rates on iron ore from New York to destinations in the Youngstown area to the Baltimore basis, and on the same date the New York Central proposed a similar rate from Boston to the Youngstown area.

Shortly thereafter the third series of changes took place. First, the Baltimore and Ohio and Western Maryland railroads proposed a 20-cent reduction in the rates on iron ore from Baltimore to the Wheeling, Youngstown and Steubenville areas, and the Baltimore and Ohio also proposed a similar reduction from Baltimore to steel mills in

the Johnstown and Pittsburgh areas. To meet this the Pennsylvania also filed tariffs, to become effective on February 16, 1953, publishing a similar reduction in its rates on iron ore from both Baltimore and Philadelphia to destinations in the Johnstown and Pittsburgh areas, and by tariffs filed to become effective March 11, 1953, the Pennsylvania proposed to establish rates on iron ore from Philadelphia to the aforesaid 17 destinations west of Pittsburgh on the same basis as proposed by the Baltimore and Ohio and Western Maryland in their tariffs filed to become effective February 16, 1953. The Commission suspended all of these proposed rates and instituted an investigation under Section 15(7) of the Interstate Commerce Act.

By its report and order of February 5, 1954, Division 2 of the Commission unanimously approved the second change in rates, published in the Pennsylvania Railroad's tariff to become effective February 9, 1953, under which the rates on iron ore from Philadelphia to points west of Pittsburgh would be on the same basis as rates published from Baltimore on October 9, 1950, finding these rates to be just and reasonable and otherwise lawful. In the same decision, with one dissent, the Division concluded that the remainder of the second change in rates—the proposed reduced rates on iron ore from New York and Boston—and all the reductions proposed in the third series of changes—the proposed further reductions from both Baltimore and Philadelphia—had not been shown to be just and reasonable. Following this decision, the approved rates from Philadelphia became effective February 19, 1954, and are still in effect.

Upon petitions of various parties, the Commission reopened the proceedings on July 30, 1954 for further hearing. Thereafter there was a fourth proposed change, where, by schedules filed to become effective October 21, 1954, the Boston and Maine and New York, New Haven and Hartford railroads, and their connections, filed tariffs

proposing rates from Boston to the Youngstown area on the Baltimore-Philadelphia basis. These rates were also suspended by the Commission. Again by unanimous action, the Commission in its report and order of October 1, 1956 affirmed the Division with respect to the Philadelphia rates, finding just and reasonable the tariffs of the Pennsylvania Railroad publishing rates on iron ore from Philadelphia to the 17 points west of Pittsburgh on the same level as the rates already maintained on such traffic from Baltimore. The Commission also found in said report and order, with four dissents, that the rates on iron ore from New York to destinations in the Youngstown area, published on the Baltimore basis, were just and reasonable, but that, with one dissent, the rates from Boston on the same basis had not been shown to be just and reasonable. The Commission held, as previously found by the Division, that the third and later retaliatory proposed rates of the railroads serving Baltimore and Philadelphia were not shown to be just and reasonable.

This action was brought by the Baltimore and Ohio, Western Maryland and Canton railroads, together with certain Baltimore civic and commercial interests, to enjoin and set aside those parts of the Commission's order of October 1, 1956 which approved as just and reasonable the rates from New York and Philadelphia on the same basis as those applicable from Baltimore to the aforesaid destinations and which found the proposed lower rates from Baltimore not shown to be just and reasonable. By its decree of May 22, 1957, the District Court set aside and enjoined the Commission's order of October 1, 1956 insofar as it approved the tariffs publishing rates on iron ore from New York and ordered the Commission to require the railroads serving New York to cancel such tariffs. The court below also held that the order of the Commission insofar as it approved the tariff schedules of the Pennsylvania Railroad from Philadelphia, published to become effective February 9, 1953, is not sup-

ported by essential basic findings, and remanded the case to the Commission to make more explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued, or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 15, 1954, when parity went into effect, and for further proceedings consistent with its opinion. The court below further held that the order of the Commission should be affirmed insofar as it disapproves tariff schedules filed to become effective on February 16, 1953 proposing reduced rates from Baltimore to Pittsburgh and destinations west thereof and the tariff schedules filed to become effective on February 16, 1953 and March 11, 1953 from Philadelphia to Pittsburgh and destinations west thereof, respectively.

This appellant has appealed only from that portion of the District Court's decree which remands to the Commission its order approving the rates from Philadelphia filed to become effective February 9, 1953.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. This appeal does not require the Court to examine and re-evaluate the evidence. The questions, rather, relate to basic issues as to the respective responsibilities of the Commission and a court reviewing its orders—issues on which the court below is, we believe, in serious error.

The District Court, because of a fundamental misconception of the nature of the case, has misconstrued the order of the Interstate Commerce Commission and failed properly to evaluate the Commission's findings, made upon substantial evidence, which support the Commission's

ultimate conclusion that the tariffs filed to become effective February 9, 1953 on iron ore from Philadelphia are just and reasonable.

a. At the outset of its opinion the District Court states that the order of the Commission "prescribed" a parity of rates on imported iron ore from Baltimore, Philadelphia and New York and it then proceeds to reach a determination as to whether the Commission was right in taking such action (App. A, p. 27). In so doing the court below made a fundamental error, for it completely misconstrued what the Commission did and its misconception of the Commission's function dominates the court's consideration of the validity of the Commission's order.

The proceedings before the Commission were not instituted under Section 15(1) of the Interstate Commerce Act but under Section 15(7) of said Act, which provides that whenever a tariff schedule stating a new rate is filed, the Commission is authorized to enter upon a hearing concerning the lawfulness of such rate, and that pending such hearing and the decision thereon, the Commission may suspend the operation of such tariff. Section 15(7) also provides that the burden of proof shall be upon the carrier publishing the tariff to show that the proposed changed rate is just and reasonable.

That is what the Commission did here. It suspended the tariffs publishing the reduced rates and entered upon a determination of their lawfulness. It found that the Pennsylvania had met its burden of proof with respect to the lawfulness of the rates from Philadelphia published to become effective February 9, 1953 and that such rates are therefore just and reasonable. Regarding the further rate reductions from Philadelphia and the proposed reductions from Baltimore, the Commission found that such reductions were not shown to be just and reasonable. There was therefore no prescription by the Commission of a parity of rates, Philadelphia with Baltimore. The Commission merely passed on the validity

of carrier-initiated rates under Section 15(7), and, as will be shown, in so doing the Commission considered and applied accepted standards, and made adequate basic findings with respect thereto, in reaching its ultimate findings.

b. The District Court has likewise misconceived the nature of the issue in concluding that the Commission departed from a long-established practice which has kept the rates applicable to both import and export traffic to and from "differential territory" lower as to Baltimore than the other Atlantic ports (App. A, p. 28). The court went on to state that the differentials were first established in 1877, and that while the arrangement was voluntary, it has been considered by the Commission from time to time during the past 60 years when brought to its attention by commercial interests in Boston, New York, Philadelphia and Baltimore, and in each instance has been found lawful (App. A, p. 29). The court further stated that the specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the "striking down" of the long-established differential in favor of Baltimore in order to enable Philadelphia and New York to have a share of the traffic and thereby insure their maintenance as ports of entry (App. A, p. 55). The court claims that the Commission concluded that the natural advantages to which the Port of Baltimore would ordinarily be entitled were outweighed by the need to maintain ports of entry for iron ore at Philadelphia and New York and that this should be accomplished by diverting traffic from Baltimore to the other ports to such an extent that the facilities already established at Philadelphia may be more extensively and profitably used, and so that New York would be encouraged to build facilities which it does not now possess (App. A, p. 53). The court concludes that the propriety and sufficiency of the Commission's findings must be appraised against the historic background in which the dif-

ferential in favor of Baltimore has been maintained (App. A, p. 57). Thus, it is evident that the lower court's consideration of the Commission's decisions was permeated with the view that rates on imported iron ore are a part of the general port differential rate adjustment and that such adjustment bears a sanctity, referred to by the court as a "prior norm" (App. A, p. 55).

On the basis of this reasoning the court proceeded to its conclusion that the Commission's findings were insufficient to warrant the striking down of the differential and remanded the case, insofar as the Philadelphia rates are concerned, for explicit findings as to the relative costs of shipping iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, with or without the so-called differential. In treating this case as dependent on the general port differential rate adjustment and appraising the Commission's decision on the basis of such adjustment, the lower court clearly erred.

In the first place, the rates here in issue cannot be considered as a part of the port differential adjustment and the Commission has so found on the basis of the record made before it. The evidence established that the port differentials have been applied generally to grains and merchandise traffic, but not to low-grade, heavy-loading, raw materials moving in volume in open-top cars, such as iron ore, coal and coke. The record further shows that in none of the numerous decisions involving the port differential rate adjustment, cited by the court below, has the Commission included, or even mentioned, iron ore. In its decision herein the Commission specifically found that establishment of the proposed rates from Philadelphia would not result in disrupting the existing port relationship on traffic generally and noted that equal rates on iron ore from Philadelphia and Baltimore to Pittsburgh had been maintained for over 50 years without disturbing the port relationship on other commodi-

ties (291 I. C. C. 527, 554). Pittsburgh is in so-called differential territory (291 I. C. C. 527, 530).

Moreover, even assuming for purpose of argument that iron ore rates have been a part of the port differential rate adjustment, the adjustment has been a voluntary one. The cases cited by the District Court in which the Commission upheld the adjustment were all cases in which the carriers defended the adjustment (App. A, p. 29) But carriers are free to initiate rates within the zone of reasonableness to meet competition of other carriers in spite of pre-existing voluntary differentials. See *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394, affirmed 342 U. S. 890, in which an order of the Commission requiring carriers to maintain a differential on export rates on ex-lake grain was set aside. Although the court below cited the *New York Central* case regarding the nature of findings required of the Commission, it gave no recognition to the principle for which the case stands. In remanding the matter of the Philadelphia rates to the Commission, the lower court has improperly restricted the Commission in its consideration of the lawfulness of carrier-initiated rates.

2. The District Court has also paid only lip service to the doctrines of primary jurisdiction and administrative finality by making its own findings, including predictions, contrary to those of the Commission made upon substantial evidence, and in then remanding the proceeding to the Commission for further proceedings consistent with the Court's opinion.

The doctrines of primary jurisdiction and administrative finality are fundamental. It is well-settled that a reviewing court cannot, under the guise of exerting judicial power, usurp purely administrative functions by setting aside a lawful administrative order upon its conception of whether the administrative power has been wisely exercised. *Interstate Com. Comm.* v. *Ill. Cent. R.R.*,

215 U. S. 452, 470. The courts will not examine the facts further than to determine whether there was substantial evidence to sustain the Commission's order, and have no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with alleged inconsistency with findings made in other proceedings before it. *Int. Com. Comm.* v. *Union Pacific R.R.*, 222 U. S. 541, 547-548. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Hanna Furnace Corporation* v. *United States*, 53 F. Supp. 341, 344, affirmed 323 U. S. 667. The wisdom of an order of the Commission is not a question for judicial determination, and the court must confine itself to the ultimate question as to whether the Commission acted within its powers. *Baltimore & O. R. Co.* v. *United States*, 9 F. Supp. 181, 198-199, affirmed 298 U. S. 349.

Although the court below seemingly recognized these principles, it did not apply them. It violated these principles when, as noted above, it misconstrued the Commission's decisions. In so doing the court made findings of its own contrary to those of the Commission. The court looked into the future and found, as an assured prospect, that importation of iron ore from Labrador will dominate the situation, and that the future movement of foreign ore, especially from Labrador, is the all-important circumstance of this case (App. A, pp. 36, 37). The court also found that ore will be delivered, in case of parity of railroad rates, to the nearest port equipped with efficient unloading facilities, and that under a parity of rates Labrador ore destined to so-called differential territory will move through Philadelphia and not through Baltimore (App. A, pp. 38, 39). These findings are contrary to those of the Commission (291 I. C. C. 527, 554; 299 I. C. C. 195, 197, 200, 202-3, 209). In remanding the case to the Commission for findings as to the iron ore traffic to be expected at Baltimore and Philadelphia, if parity is continued or the so-called differential restored, taking into account the volume of traffic through the ports

since February 19, 1954 and for further proceedings consistent with the court's opinion, the court, in effect, has remanded the case to the Commission for confirmation of its own contrary findings.

Furthermore, the District Court made findings contrary to those of the Commission regarding the weight to be accorded to differences in distances from Philadelphia and Baltimore to the destination territory (App. A, p. 58; 291 I. C. C. 527, 539, 552-3; 299 I. C. C. 195, 201, 208).

These findings by the court constituted a usurpation of the administrative function and negate the Commission's responsibility under the Interstate Commerce Act.

3. The District Court has committed serious and important errors in interpreting and in applying to the evidence in this case the provisions of the Interstate Commerce Act and of the National Transportation Policy.

a. As previously indicated, the lower court based its review of the Commission's decision on the court's theory that the validity of the Commission's ultimate finding that the Philadelphia rates are just and reasonable should be dependent on whether the Commission made what the court considered as necessary findings to support the elimination of what the court regarded as a part of the general port differential rate adjustment. In fact, the court stated that in the absence of specific findings on ocean costs and on a future division of traffic depending on the measure of the Philadelphia and Baltimore rates, it did "not seem reasonable to destroy a long established differential on the strength of which the railroads serving Baltimore have made large investments and the commercial interests of the port have made their arrangements" (App. A, p. 61).

In so doing, the District Court failed to recognize the function of the Commission in the matter presented to it for determination, and further, that the Commission fully discharged that function through adequate basic findings which were supported by substantial evidence.

In considering the lawfulness of the carrier-initiated rates from Philadelphia under Section 15(7) of the Interstate Commerce Act, the Commission tested their reasonableness under Section 1(5) and determined whether they were unduly preferential under Section 3(1) of that Act. With respect to Section 1(5), the Commission applied the usual criteria, *i. e.*, earnings and distances, comparisons with other rates, and the effect of the proposed rates on the movement of traffic, pursuant to the requirement of Section 15a(2), and found that the Philadelphia rates met these standards (291 I. C. C. 527, 553, 554). It found, with respect to Section 3(1), that differences in distances from Philadelphia and Baltimore to the destination territory are so inconsequential that a parity of rates would not result in undue preference or prejudice (291 I. C. C. 527, 554).

The lower court dismisses the Commission's consideration of comparisons of the earnings under the Philadelphia rates with those on iron ore between other points, and particularly of the instances of parity between such other rates in spite of differences in distances, with the statement that the Commission seemed to have found them correct (App. A, p. 44). The Commission's finding was that the rates from Philadelphia compare favorably with rates applicable on iron ore from and to points in central and trunkline territories and thus come within the zone of reasonableness, citing *New York Cent. R. Co.* v. *United States, supra* (291 I. C. C. 527, 553). The court disregarded this finding.

Regarding differences in distances, the court characterized the Commission's decision as finding that the distances via the Pennsylvania Railroad from both Philadelphia and Baltimore were controlling (App. p. 45). The Commission's decision is not susceptible of such interpretation. While the Commission found that the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore, it also found that

the average short-line distance from Philadelphia to the Youngstown area exceeds that from Baltimore by only 11.6 percent and that the difference is less when actual working routes are considered (299 I. C. C. 195, 208). In spite of these findings the lower court persists in referring to the "natural advantages" of Baltimore from a distance view-point (App. A, p. 53) which the Commission found had no significance rate-wise, either with respect to the reasonableness of the Philadelphia rates or in considering whether they were unduly prejudicial.

Despite the court's interpretation of the Commission's decision, the Commission did give consideration to vessel costs and tonnages, both past and future. With respect to the former, the Commission recognized that in some circumstances there is a saving in cost to the shipper in using a port nearest to the point of origin, but it did not consider this as of controlling importance in reaching its ultimate conclusion (299 I. C. C. 195, 198). With respect to tonnages, the Commission made detailed findings as to the movements of iron ore through the ports up to the date of the closing of the record in December, 1954 (299 I. C. C. 195, 197, 200, 202-3). With ample support in the record, the Commission found that iron ore would move through both Philadelphia and Baltimore and that the tonnage through Baltimore will probably increase, even at equal rates with Philadelphia (299 I. C. C. 195, 209).

The statistics of record include the movements of import iron ore through Baltimore and Philadelphia up to December, 1954, when the further hearings were closed. The Commission had ample evidence on which to make its findings. In remanding the case for findings regarding movements through the ports since the close of the record to make it current, the court, in effect, would hold the record open indefinitely, for of necessity there must be a lapse of time between the closing of a record and an administrative determination thereon, not to mention court review. Manifestly, records before administrative agencies must at some point be closed, and, in view of the Com-

mission's findings, no compelling reason has been advanced by the court to reopen the record in this instance.

After questioning the validity of the Commission's decision approving rates from Philadelphia equal to those from Baltimore to points west of Pittsburgh, because of the general port differential adjustment, the lower court upheld the Commission's action in approving a parity of rates to Pittsburgh, which is also in so-called differential territory. In so doing, the court reasoned that the *status quo* should be continued in this respect as it considered it should be in the case of Baltimore (App. A, p. 62). The anomaly which would result from the court's action becomes apparent when it is realized that Pittsburgh is an intermediate point in the routes of the Baltimore and Ohio and the Pennsylvania to Youngstown, a representative destination, and that the Baltimore and Ohio's distance from Pittsburgh to Youngstown is 10 miles greater than that over the Pennsylvania (291 I. C. C. 527, 537). Thus, under the court's reasoning, while the same rate should apply from both Philadelphia and Baltimore to Pittsburgh, the rate over the Pennsylvania from Philadelphia to Youngstown through Pittsburgh would be greater than the rate from Baltimore to Youngstown through Pittsburgh via the Baltimore and Ohio, even though the Pennsylvania's distance from Pittsburgh to Youngstown is less.

b. The court below also failed properly to evaluate the Commission's decision in the light of the National Transportation Policy. By its terms, the policy has for its purpose the administration of the Interstate Commerce Act to the end of developing, coordinating and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. The Commission is required to administer the provisions of the Interstate Commerce Act with a view to carrying out such policy. In both decisions, the Commission made findings pursuant to that policy. In its report of February 5, 1954, Division 2 found (*a*) that in the years to come a large portion of the iron ore used in this country will originate in

foreign countries, (*b*) that such iron ore is and will be an important factor in national defense, (*c*) that especially in case of national emergency, it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port which could be incapacitated through congestion or other cause, (*d*) that, in the interest of national defense, Philadelphia and Baltimore should be placed on a rate parity as proposed in the tariff schedules filed to become effective February 9, 1953, and (*e*) that such a parity would not result in undue preference or prejudice (291 I. C. C. 527, 554). Again, in its decision of October 1, 1956 the Commission made similar findings, stating that it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports, and that it had given such matters consideration, among others of record, in reaching its conclusions (299 I. C. C. 195, 209).

The court claims that the principal basis for the Commission's decision was an attempt on its part to build up a national transportation system through a rate parity. The court goes on to say that the Commission cannot do this in disregard of a right of a locality to enjoy its natural advantages and in disregard of Section 3 of the Interstate Commerce Act which prohibits unlawful preferences and unlawful discrimination (App. A, pp. 59-60). Again, the court is applying its views regarding the weight to be given to differences in distances from the ports, which the Commission has regarded as of no consequence as between Philadelphia and Baltimore. It cannot be said that in making its findings under the National Transportation Policy the Commission disregarded the requirements of other sections of the Interstate Commerce Act, as the court would imply; for, as previously noted, the Commission made requisite findings under Sections 1(5) and 3(1) of that Act. In so doing, the Commission gave consideration both to the National Transportation Policy and to other criteria.

In failing to accept the Commission's findings with respect to the National Transportation Policy, it is apparent that the court has been influenced by what it considers will be an adverse effect upon Baltimore under a parity of rates, and has accorded paramount importance to a private interest, as opposed to the national interest, in derogation of the Policy.

While the court may not agree with the Commission's appraisal of the evidence, the fact remains that the Commission has found, upon substantial evidence, that iron ore will not move through Philadelphia to the interior on rates higher than those prevailing from Baltimore. In making such finding, the Commission had before it the matter of ocean distances and costs as well as other evidence. In refusing to accept the Commission's finding that a parity of iron ore rates, Philadelphia with Baltimore, is in accordance with the National Transportation Policy, the Court has committed serious error. *Luckenbach S. S. Co.* v. *United States*, 122 F. Supp. 824, affirmed 347 U. S. 984.

CONCLUSION

For the reasons stated herein, the questions presented by this appeal are substantial, and it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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PROOF OF SERVICE

I, Richard R. Bongartz, attorney for The Pennsylvania Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of September, 1957, I served copies of the foregoing Jurisdictional Statement on the several parties to this action, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with first class postage prepaid, to the Honorable Herbert Brownell, Attorney General, and to the Honorable J. Lee Rankin, Solicitor General, United States Department of Justice, Washington 25, D.C., and to Leon H. A. Pierson, Esq., United States Attorney for the District of Maryland, United States Post Office Building, Baltimore 2, Maryland.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to the Honorable Robert W. Ginnane, its General Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Edwin H. Burgess, Jervis Langdon, Jr., Anthony P. Donadio, and Charles J. Henry, Jr., Esqs., Attorneys for The Baltimore and Ohio Railroad Company, Baltimore and Ohio Building, Baltimore 1, Maryland.

To John S. Stanley, Esq., Attorney for The Baltimore and Ohio Railroad Company, First National Bank Building, Baltimore, Maryland.

To William C. Purnell, Esq., Attorney for Western Maryland Railway Company, 501 St. Paul Place, Baltimore 2, Maryland.

To J. Crossan Cooper, Jr., John Henry Lewin, and Francis D. Murnahan, Jr., Esqs., Attorneys for Canton Railroad Company, Mercantile Trust Building, Baltimore, Maryland.

To Harry C. Ames, Esq., Attorney for The Mayor and City Council of Baltimore, Baltimore Association of Commerce, Baltimore Chamber of Commerce, The Steamship Trade Association of Baltimore, and Baltimore Custom House Brokers and Forwarders Association, Transportation Building, Washington, D.C.

To Thomas N. Biddison, Charles McD. Gillam, and F. Clifford Hane, Esqs., Attorneys for The Mayor and City Council of Baltimore, Baltimore Association of Commerce, Baltimore Chamber of Commerce, The Steamship Trade Association of Baltimore, and Baltimore Custom House Brokers and Forwarders Association, Court House, Baltimore, Maryland.

To William L. Marbury and Franklin G. Allen, Esqs., Attorneys for Maryland Port Authority, 1000 Maryland Trust Building, Baltimore, Maryland.

To Donald Macleay, Esq., Attorney for Maryland Port Authority, 1625 K Street, N.W., Washington, D.C.

4. On The New York Central Railroad Company and Erie Railroad Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respecitve attorneys of record, as follows:

To Robert D. Brooks, Esq., Attorney for The New York Central Railroad Company, 466 Lexington Avenue, New York 17, N. Y.

To Richard J. Murphy, Attorney for The New York Central Railroad Company, 1225 LaSalle Street Station, Chicago 5, Illinois.

To Nicholas G. Penniman, III, Esq., Attorney for The New York Central Railroad Company, 806 Mercantile Trust Building, Baltimore 2, Maryland.

To M. C. Smith, Jr., Esq., Attorney for Erie Railroad Company, Midland Building, Cleveland, Ohio.

To Francis A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman, J. Stanley Payne, and Walter J. Myskowski, Esqs., Attorneys for Erie Railroad Company, 743 Investment Building, Washington 5, D.C.

5. On C. W. Boin, Agent, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to him at 1 Park Avenue, New York, N. Y.

6. On the Port of New York Authority, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record, as follows:

To Sidney Goldstein and Francis A. Mulhern, Esqs., 111 Eighth Avenue, New York 11, N. Y.

To Arthur L. Winn, Jr., Samuel H. Moerman, J. Stanley Payne, and Walter J. Myskowski, Esqs., 743 Investment Building, Washington 5, D.C.

To Nicholas G. Penniman, III, Esq., 806 Mercantile Trust Building, Baltimore 2, Md.

7. On the Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Corporation (Weirton Steel Company Division),

Republic Steel Corporation, Wheeling Steel Corporation, and the Youngstown Sheet and Tube Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To John F. Donelan, Esq., Munsey Building, Washington 4, D.C.

To Wendell D. Allen, Esq., Equitable Building, Baltimore 2, Md.

8. On The Delaware River Port Authority, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record, as follows:

To Warren Price, Jr., Esq., 1116 Investment Building, Washington 5, D.C.

To Morris Duane, Esq., 1617 Land Title Building, Philadelphia 10, Penna.

To Bruce A. Wallace, Esq., 328 Market Street, Camden 2, N. J.

To George M. Radcliffe, Esq., 1904 First National Bank Building, Baltimore 2, Md.

9. On the Chamber of Commerce of Greater Philadelphia, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record, as follows:

To Frederick H. Knight, Esq., 2107 Fidelity-Philadelphia Trust Building, Philadelphia 9, Penna.

To George M. Radcliffe, Esq., 1904 First National Bank Building, Baltimore 2, Md.

10. On the City of Philadelphia, by mailing copies in duly addressed envelopes, with first class postage

prepaid, to its resepctive attorneys of record, as follows:

To David Berger and David E. Pinsky, Esqs., City Hall Annex, Philadelphia 7, Penna.

11. On the New York, New Haven and Hartford Railroad Company and the Boston and Maine Railroad, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To William Q. Keenan, Esq., Attorney for the New York, New Haven and Hartford Railroad Company, 54 Meadow Street, New Haven 6, Conn.

To Robert Bleakney, Esq., Attorney for the Boston and Maine Railroad, North Station, Boston, Mass.

To Herbert M. Brune, Esq., 10 Light Street, Baltimore 2, Maryland.

12. On the Port of Boston Commission, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record, as follows:

To Henry E. Foley and Clarence I. Peterson, Esqs., 10 Post Office Square, Boston, Mass.

To Herbert M. Brune, Esq., 10 Light Street, Baltimore 2, Maryland.

Richard R. Bongartz,

Attorney for The Pennsylvania Railroad Company

Transportation Center,
6 Penn Center Plaza
Philadelphia 4, Penna.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. 9237

The Baltimore and Ohio Railroad Company, et al.,
Plaintiffs,

versus

The United States of America, et al.,
Defendants.

(Argued January 21 and 22, 1957. Decided 26 April 1957.)

Before SOPER, Circuit Judge, CHESTNUT and R. DORSEY WATKINS, District Judges.

EDWIN H. BURGESS (William C. Purnell, Jervis Langdon, Jr., Anthony P. Donadio, John S. Stanley, Charles J. Henry, Jr., on brief), for plaintiffs.

HARRY C. AMES, Washington, D. C. (Thomas N. Biddison, F. Clifford Hane, attorneys for Mayor and City Council of Baltimore, on brief), for Baltimore Association of Commerce and other Baltimore Commercial Interests, plaintiffs.

J. CROSSAN COOPER, JR. (Francis D. Murnaghan, Jr., on brief), for Canton Railroad Company, plaintiff.

WILLIAM L. MARBURY (Donald Macleay, Washington, D. C., and Franklin G. Allen, Baltimore, Md., on brief), for Maryland Port Authority, plaintiff.

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JOHN H. D. WIGGER, Attorney, Department of Justice (Victor R. Hansen, Assistant Attorney General; Walter E. Black, Jr., United States Attorney; James E. Kilday, Attorney, Department of Justice; Robert W. Ginnane, General Counsel and I. K. Hay, Assistant General Counsel, Interstate Commerce Commission, on brief), for defendants.

JOHN F. DONELAN, Washington, D. C. (Dickson R. Loos, Washington, D. C., Wendell D. Allen, Baltimore, Md., on brief), for Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Corporation (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, and the Youngstown Sheet and Tube Company, intervenors.

HENRY E. FOLEY, Boston, Mass. (Herbert M. Brune, Jr., Baltimore, Md., and Clarence I. Peterson, Boston, Mass., on brief), for Port of Boston Commission, intervening defendant.

WILLIAM Q. KEENAN, New Haven, Conn. (Herbert M. Brune, Jr., Baltimore, Md., and Robert Bleakney, Jr., Boston, Mass., on brief), for the New York, New Haven & Hartford R. R. Co. and for the Boston & Maine R. R. Co., defendants.

RICHARD M. MURPHY, Chicago, Ill., and Samuel H. Moerman, Washington, D. C. (M. C. Smith, Jr., Cleveland, Ohio; Robert D. Brooks, New York, N. Y.; Sidney Goldstein, New York, N. Y.; Francis A. Mulhern, Wilbur La Roe, Jr., Arthur L. Winn, Jr., J. Stanley Payne, Walter J. Myskowski, all of Washington, D. C.; Nicholas G. Penniman, III, Baltimore, Md., on brief), for the Erie Railroad Company, defendant; the New York Central Railroad Company and the Port of New York Authority, intervening defendants.

Appendix A

GUERNSEY ORCUTT, Philadelphia, Pa. (Richard R. Bongartz, Philadelphia, Pa.; William Pepper Constable and George W. Constable, Baltimore, Md., on brief), for The Pennsylvania Railroad Company and C. W. Boin, Agent, defendants.

DAVID E. PINSKY, Assistant City Solicitor (David Berger, City Solicitor, on brief), for the City of Philadelphia, intervening defendant.

(George M. Radcliffe, Baltimore, Md., and Frederick H. Knight, Philadelphia, Pa., on brief for Chamber of Commerce of Greater Philadelphia, intervening defendant.)

WARREN PRICE, JR., Washington, D. C. (George M. Radcliffe, Baltimore, Md.; Morris Duane, Philadelphia, Pa.; Bruce A. Wallace, Camden, N. J., on brief), for the Delaware River Port Authority, intervening defendant.

SOPER, Circuit Judge:

This suit was brought by the Baltimore and Ohio Railroad Company, Western Maryland Railway Company, Canton Railroad Company and certain civic authorities and commercial organizations of Baltimore, Maryland, to set aside decisions and orders of the Interstate Commerce Commission which prescribed parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia and New York to seventeen destinations in the eastern portion of the so-called differential or Central Freight Association territory. This area lies west of a line from Buffalo, New York to Pittsburgh, Pennsylvania and includes Youngstown, Ohio, on the north, Wheeling, West Virginia, on the south and other intervening steel producing points in western Pennsylvania, eastern Ohio and

northern West Virginia.[1] The defendants, in addition to the United States and the Interstate Commerce Commission, include as original or intervening defendants the Pennsylvania Railroad Company which serves the port of Baltimore as well as the ports of Philadelphia and New York, the New York Central Railroad Company and the Erie Railroad Company which serve the port of New York, the Port of New York Authority, the New York, New Haven and Hartford Railroad Company and the Boston and Maine Railroad Company which serve the port of Boston, the Port of Boston Commission and divers producers and fabricators of steel in the differential territory.

The decisions of the Commission which are challenged in this proceeding mark the departure from a long established practice which has kept the rates applicable to both import and export traffic to and from differential territory lower as to Baltimore than the other Atlantic ports. The differentials were first established in 1877 by agreement of the carriers serving the territory in order to avoid misunderstandings in respect to the geographical advantages of Baltimore, Philadelphia and New York, as affected by rail-and-ocean transportation, so as to equalize the aggregate cost of transportation between competing points in the west and the domestic and foreign ports reached through those cities. The differentials were arbitrary in a measure since they reflected only in part the lesser distances to Baltimore and Philadelphia as compared with the distances to New York and Boston, but they were established by compromise as the only means of averting

[1] Differential territory is defined in *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I. C. C. 691, 692. The seventeen points, all consuming or storage centers for iron ore, are Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowellville, Niles, Struthers, Warren, and Youngstown, Ohio; Benwood, E. Steubenville, Follansbee, Weirton and Wheeling, W. Va.

rate wars.[2] The differentials applied to all traffic eastbound and westbound, domestic and export-import, between Central territory and the north Atlantic ports. The differential on eastbound export traffic from the differential territory was 60 cents per ton less to Baltimore and 40 cents per ton less to Philadelphia than the corresponding rates to New York. On westbound import traffic the same differential applied to third or fourth class and special commodity rates. Rates to Boston were not to be less than those to New York on domestic or foreign freight. In 1880 an attempt was made to modify the agreement on the ground that changes had substantially equalized ocean freights but after arbitration by the Thurman Advisory Commission the differentials established in 1877 were reaffirmed.

While this arrangement originated in a voluntary agreement of the carriers it has been considered by the Commission from time to time during the past 60 years when it was brought to the Commission's attention by commercial interests in Boston, New York, Philadelphia and Baltimore, and in each instance has been found lawful.[3]

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[2] See *Maritime Asso., Boston Chamber of Commerce* v. *A. A. R. R. Co.*, 95 I. C. C. 539, 567; 126 I. C. C. 199.

[3] For a résumé of the history of the differential, see *In the Matter of Differential Rates*, 11 I. C. C. 13 (1905); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I. C. C. 151 (1936). It was also considered under varying circumstances in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I. C. C. 612 (1898); *In the Matter of Relative Rates upon Export and Domestic Traffic in Grain and Grain Products*, 8 I. C. C. 214 (1899); *Chamber of Commerce of N. Y.* v. *N. Y. C. & H. R. R. R. Co.*, 214 I. C. C. 155 (1912); *In The Matter of Import Rates*, 24 I. C. C. 78 (1912); *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I. C. C. 691 (1929); *Lighterage Cases*, 203 I. C. C. 481 (1934); *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I. C. C. 21 (1938); *State of New Jersey* v. *Baltimore & O. R. Co.*, 24 I. C. C. 581 (1941); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I. C. C. 165 (1941); *Ex Parte Grain from Buffalo to N. Y.*, 278 I. C. C. 31 (1950).

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Prior to 1930 the differential was applicable to both domestic and import-export traffic. In that year the Commission removed all domestic class rates from the scope of the differential rate structure and prescribed new scales of class rates from the several ports, based primarily on distance.[4] Under this new arrangement the longer distances from the three other ports resulted in a differential on domestic traffic to and from Baltimore, which exceeded the long established differential in its favor on import and export traffic. The domestic first-class rates to Youngstown from Baltimore were fixed at $2.01 per hundred pounds, from Philadelphia $2.16 per hundred pounds, from New York $2.31 per hundred pounds, and from Boston $2.70 per hundred pounds. Since these rates did not cover import and export traffic the railroads in 1932 published new import and export class rates. These were made the same as the new domestic rates so far as Baltimore was concerned and the standard differentials in favor of Baltimore of 20 cents a ton with respect to Philadelphia and 60 cents a ton with respect to New York and Boston were preserved. The import-export class rates from the three cities last mentioned thus became generally lower than their domestic rates.

For some reason, that is not explained, the rates on iron ore from Philadelphia to Pittsburgh have been the same as those from Baltimore to Pittsburgh since 1903. This parity, however, prior to the present controversy, has been only a paper equalization since there has been practically no movement from Philadelphia to Pittsburgh and no attempt has been made by the Baltimore railroads to set up a differential on this traffic.[5]

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[4] *Eastern Case Rates Investigation*, 164 I. C. C. 314.

[5] In the seven years from 1946 to 1952 inclusive, 2,160,000 gross tons moved from Baltimore to the steel mills in Pittsburgh, and 652,500 tons from Baltimore to Johnstown. No tonnage moved from Philadelphia to Pittsburgh and only 8,333 tons, comprising one cargo, to Johnstown. During the six years from 1946 to 1953 inclusive, approximately 647,000 tons moved from Baltimore to the steel mills in the Youngstown area and none from Philadelphia.

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In 1949, in response to complaints from steel producers in the interior calling attention to the increased volume of movement and other changed conditions, the carriers undertook a study of the rate structure and as a result the Baltimore and Ohio, the Western Maryland, the Pennsylvania and connecting lines established, as of October 9, 1950, reduced rates on iron ore from Baltimore to Pittsburgh and also to steel mills in differential territory to the west. The Pennsylvania made a like reduction on iron ore from Philadelphia to Johnstown and Pittsburgh. The new rates retained the regular port differential to destinations in differential territory and parity between Baltimore and Philadelphia on traffic moving to Johnstown and Pittsburgh. No action was taken at this time to establish revised rates on iron ore moving from ports other than Baltimore to differential territory, but the record of the conference of railroads shows that "it was understood the usual port differentials should be observed from the other north Atlantic ports."

In August 1951, the Pennsylvania, anticipating an increase in the volume of imported iron ore and conscious that it could not expect to share in the transportation of the commodity from Philadelphia to the interior without adequate unloading facilities at this port, announced that it would erect a modern unloading facility at Greenwich in South Philadelphia designed to cost not less than $10,000,000. It proceeded to erect such facility and had spent the greater part of this sum before publishing reduced rates on iron ore, effective February 9, 1953, to which reference will now be made. Unloading facilities were installed in Baltimore by the Canton Railroad in 1917.

It was against this background that the Interstate Commerce Commission, in the decisions now under review, gave its approval to parity of rates on iron ore moving from New York, Philadelphia and Baltimore to Central territory, but denied parity to Boston. The case grew out

of the publication by the Pennsylvania of reduced rates on iron ore, effective February 9, 1953, from Philadelphia to the seventeen points in differential territory, and the simultaneous publication of like rates by the New York Central from the ports of New York and Boston, and by the Erie Railroad from New York to destinations in the Youngstown area on their lines. The effect of these publications was to reduce the rates on iron ore from Philadelphia, New York and Boston to Youngstown to $2.71 per gross ton, the same rate which applied to Baltimore.[6] In order to meet this reduction and to preserve at least in part the historic differential, the Baltimore and Ohio and the Western Maryland then published, to be effective February 16, 1953, a reduced rate of $2.51 per ton on iron ore from Baltimore to those of the seventeen points on their lines, thus restoring a 20-cent differential in favor of Baltimore as compared with the other three ports. No attempt was made by the Baltimore railroads to restore the standard differential of 60 cents over New York and Boston.

The Baltimore and Ohio and the Western Maryland also published a reduction of 20 cents per ton, effective February 16, 1953, to Pittsburgh, Johnstown, Donora and Monessen in order to establish a differential on shipments of ore to Pittsburgh in accordance with the general port differential structure and to preserve a proper rate relationship between Pittsburgh and the other named cities. The Pennsylvania countered with a rate reduction of 20 cents per ton, effective February 16, 1953, from Philadelphia and Baltimore to the four named cities, and a further reduction of 20 cents in its rates from Philadelphia and Baltimore to the seventeen points in differential territory, effective March 11, 1953.

The Baltimore and Ohio, the Western Maryland and

[6] The rates are stated without the general increase approved in *Ex Parte* No. 175.

divers Baltimore interests protested the rate reductions by the other railroads and all of the above-mentioned reductions were suspended by the Commission pending an investigation instituted on February 6, 1953. This was followed by a hearing and oral argument, and an order of Division 2 of the Commission on February 5, 1954, which approved the reduction originally published by the Pennsylvania, effective February 9, 1953, giving Philadelphia a parity with Baltimore, but cancelled the tariffs of the New York Central and the Erie equalizing rates from New York and Boston with Baltimore. Division 2 also found that the February 16, 1953 tariffs of the Baltimore and Ohio and the Western Maryland, and the March 11, 1953 tariffs of the Pennsylvania were not just and reasonable and ordered them to be cancelled. The Pennsylvania then published a supplementary tariff making the equalization of rates effective February 19, 1954, whereupon the Baltimore interests filed suit in this court asking a restraining order pending reconsideration by the entire Commission. The court refused to issue the order on the ground that the administrative process had not been completed, with the result that parity rates from Philadelphia went into effect and have since prevailed. The full Commission, on July 30, 1954, stayed its order cancelling the rates from Baltimore, New York and Boston and reopened the proceeding. Finally, on October 1, 1956, the Commission rendered its decision, finding that the February 9, 1953 rates from Philadelphia and New York were justified but that the February 16, 1950 rates from Baltimore, the March 11, 1950 rates from Philadelphia, and the February 9, 1953 rates from Boston were not justified and ordered them cancelled. In this proceeding we are concerned with the propriety of the Commission's action as to the rates from Baltimore, Philadelphia and New York.[7]

[7] By a subsequent decision filed on March 19, 1957, the Commission reaffirmed its decision as to the Boston rate.

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The modification of rates on iron ore by the railroads which serve the Atlantic ports in competition with Baltimore was brought about by important changes in business conditions involving an increased demand for steel and an increase in the importations of iron ore which theretofore had contributed little to the total volume of commodities transported by the railroads from the coast to the interior. The origins of the ore that has been and will be imported through the Atlantic ports have an important bearing on the controversy. No figures are available for the years 1955, 1956 or 1957 since the record before the Commission was closed on December 21, 1954, and the case is submitted to this court on the Commission's record. An outline of the conditions prevailing prior to and after World War II and until the Commission's record was closed is set out in the following excerpt from the report of Division 2 of the Commission:

> "Mines in northern Minnesota, Wisconsin, and upper Michigan have for many years been the sole or principal source of supply for the iron-ore requirements of steel mills in central and trunkline territories, the preponderance of the ore moving by rail to Lake Superior docks, thence by water to lower Lake Erie ports, and by rail beyond. Prior to the end of World War II in 1945, importation of iron ore was comparatively light and the preponderance of the ore imported was consumed in furnaces at or near the eastern seaboard. Some imported ore moved to steel mills in the Johnstown and Pittsburgh, Pa., areas but little, if any, moved to mills west thereof. A few shipments which moved to interior points were consigned to manufacturers of paint or other commodities not produced by the steel mills.
>
> "Since the end of World War II, steel producers have developed sources of supply for iron ore in

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Venezuela, Chile, Liberia, Brazil, Sweden, and Cuba, and this basic raw material of the steel industry has been imported in large volume. Mines now being developed in Labrador by the Iron Ore Company of Canada will supply large quantities of iron ore for the furnaces of five steel mills in central territory which own stock in that corporation, and to other consumers. During the 6-year period from 1936 through 1941 from approximately 2,000,000 to 2,500,000 tons of iron ore were imported annually. The import movement declined drastically during World War II, reaching a minimum of 402,096 tons in 1943, most of which originated in Canada. Following the war, importation of iron ore increased from 1,189,300 tons in 1945 to 10,145,415 tons in 1951, the latter figure equivalent to over 4 times the prewar tonnage. In 1952, a strike occurred in the steel industry and approximately 9,760,300 tons of iron ore were imported during that year. It is estimated that within a few years 20,000,000 tons of iron ore will be imported annually, a substantial portion of which will move to furnaces in central territory. While ex-lake ore will continue to move from the Lake Erie ports in large volume, it will be replaced by imported ore to a greater extent than in the past."

The full Commission, in its report of October 1, 1956, commented upon the increase in importations of iron ore into the United States in the following excerpt from its decision:

"Iron ore imported into the United States in 1948 originated in 28 foreign countries and aggregated 6,091,677 gross tons. By 1953 the tonnage had increased to 11,074,035 gross tons. The principal exporting countries in this period were Chile, Sweden,

Venezuela, Brazil, Liberia, and Peru. On and between August 26 and October 6, 1954, a total of 1,511,875 gross tons of ore were shipped from 13 foreign ports to north Atlantic ports.. Of this amount, 776,851 tons (51 percent) entered the Port of Baltimore, 718,809 tons (48 percent) entered the Port of Philadelphia, and 16,215 tons (1 percent) entered the Port of Boston. There was no reported entry of ore at New York during this period. Approximately one-third of this ore originated at Seven Islands, Labrador, from which no tonnage moved prior to 1954."

Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953 and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus, in the eight months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation. The facilities at Sparrows Point have a capacity of 6,000,000 tons and those at Fairless have a capacity of 2,000,000 tons annually. None of the ore delivered to Sparrows Point moves to differential territory. We are concerned primarily with the importations of iron ore that are delivered to the railroads for transportation to interior points subject to the published rates.

Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation.

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From July 31, 1954, when these shipments began, to December of that year, 1,375,747 tons were unloaded at Baltimore and Philadelphia; and it seems certain that this was merely a beginning for, as the Commission said in its final report, the evidence leaves no doubt that "Labrador tonnage will increase to 10,000,000 tons in 1956 and probably to a greater extent in later years." In short, importations from Labrador may be expected to constitute at least one-half of all the ore imported. The proportion of this business which will come to Baltimore and Philadelphia, respectively, is foreshadowed, although imperfectly, by what happened in the last six months of 1954. In that period 744,017 tons came to Baltimore and 631,730 tons to Philadelphia. The Philadelphia tonnage would have been greater and the Baltimore tonnage less by 113,210 tons but for a strike which caused a diversion to Baltimore of tonnage consigned to Philadelphia.

The effect of the abolition of the differential between Philadelphia and Baltimore, which became effective on February 19, 1954, is shown to some extent by comparison of deliveries of foreign ore from all sources to railroad piers at the two ports in 1953 and 1954. In the first year Baltimore received 1,813,512 tons of which 808,875 were delivered to the railroads for shipment to the differential territory, while Philadelphia received 1,113,917 tons of which 687,994 tons were delivered to the railroads to be delivered, 20,561 tons to Pittsburgh and 667,433 tons to points east of Pittsburgh—none of it going to the differential territory. In 1954, Baltimore received 1,644,294 tons and of this 1,070,457 tons went to destinations west of Pittsburgh; while in this year Philadelphia received 1,564,844 tons of which 681,599 tons went to the differential territory.

The future movement of foreign ore to this country, especially ore from Labrador, is the all-important circumstance in this case. The Labrador deposits are owned by

the Iron Ore Company of Canada, of which 27% is owned by the M. A. Hanna Coal and Ore Company and the balance by five steel producers[8] owning plants west of Pittsburgh, including twelve or thirteen plants in differential territory. These corporations are entitled to share in the product in proportion to their interests. The steel producers in differential territory will use their shares and the balance will be sold, for the most part, to the Bethlehem Steel Corporation. All of the ore is shipped from Seven Islands, Labrador. While some of it will move by routes not involved in this proceeding, five or six million tons will move annually through Atlantic ports to inland furnaces. The ore will be carried in ships owned or chartered by the Iron Ore Company of Canada or the participating companies; and the record shows that, in order to save transportation costs by sea, the ore will be delivered, in case of parity of railroad rates, to the nearest port equipped with efficient unloading facilities. The Commission found that the one-way ocean distances from Seven Islands to the four Atlantic Coasts to be: Boston, 950 miles; New York, 1187 miles; Philadelphia, 1320 miles, and Baltimore, 1475 miles. If the Chesapeake and Delaware Canal were used the excess distance to Baltimore over Philadelphia would be 26 miles, but the Commission found that the larger ore vessels cannot use the canal at present and probably would not use it if the canal were deepened. The evidence shows that a 20,000 ton ore carrier with a speed of 14 knots requires three days less steaming time on a round trip basis from Seven Islands to Boston, two days less to New York and twenty-one hours less to Philadelphia than to Baltimore; and that it costs $2,000 per day to operate such a ship. Abolition of the differential of 20 cents per ton in favor of Baltimore and the establishment of parity of railroad rates between

[8] National Steel Co., Republic Steel Corp., Armco Steel Corp., Youngstown Sheet and Tube Co., Wheeling Steel Corp.

Philadelphia and Baltimore would cause shippers to route Labrador ore destined for differential territory through the Port of Philadelphia.

Since the Commission's decision of October 1, 1956 took no account of any shipments subsequent to December 1954, the effect of the parity of rates between Philadelphia and Baltimore in the intervening period was not ascertained, although it might have been done before the decision was rendered. The record, however, throws some light, as we have seen, on the shipments in the limited period between February 19, 1954, when the Pennsylvania put the parity rates into effect, and December 1954. The evidence directed to this period, although necessarily meager, tends to confirm the opinion of experienced witnesses heard by the Commission, that under parity rates Labrador ore destined for differential territory will move through Philadelphia and not through Baltimore. The experience of the Canton Railroad emphasizes this conclusion. This is a shipping road with 37 miles of track in the Port of Baltimore, connecting with the Baltimore and Ohio and the Pennsylvania by rail and the Western Maryland by float. It constructed the first unloading facilities in Baltimore in 1917, in which it has invested $5,000,000 in reliance upon the differential. It is largely dependent upon the importations of ore. In 1952, its tonnage of imported ore comprised 55% of its total of which 39% was iron ore; and in 1953, the corresponding percentages were 66% and 28%, respectively. In the first nine months of 1953, it received 499,000 tons of iron ore but in the same period in 1954 under parity this amount had diminished to 239,000 tons, a decrease of 52%.

A similar situation exists with regard to the much smaller amount of ore which is brought to this country from the Port of Monrovia in Liberia. This ore is controlled by the Republic Steel Corporation, which has furnaces in differential territory and carries the ore in its own ships. In 1952, 420,000 tons were imported and it was

estimated that in 1953 the amount would be somewhat larger. Heretofore all or nearly all of this ore was delivered at the Port of Baltimore. The ocean distances (miles) from Liberia to the Atlantic ports are as follows: Boston, 3,920; New York, 3,973; Philadelphia, 4,074, and Baltimore, 4,194.

The iron ore brought in from South America and Scandinavia has little bearing on the question at issue. The Commission found that, in the first nine months of 1954, 94% of the ore which originated in Venezuela, Chile, Peru and Sweden was consigned to the United States Steel Corporation and the Bethlehem Steel Corporation. Bethlehem received about 6,000,000 tons, none of which moves to differential territory. It is estimated that United States Steel will receive about 7,000,000 tons annually, of which 2,000,000 tons will enter the United States through the Gulf ports and 2,000,000 tons more will be consumed at Fairless. There will be a substantial movement from the docks owned by the corporation at Fairless by rail to Pittsburgh. Facilities at Fairless permit the blending of the iron before shipment to Pittsburgh and this service will be improved, and when this is done the United States Steel Corporation will abandon its practice of importing through Baltimore the iron ore for use at Pittsburgh. The corporation is not interested in the rate from Baltimore but desires a lower rate from Fairless to Pittsburgh. Baltimore has an advantage as to distances over the other ports with respect to shipments of ore from South America, except Brazil, but a disadvantage with respect to the shipments from Scandinavia.

Adequate unloading facilities are essential to the delivery of iron ore at a point of entry. Canton Railroad, as we have seen, was the first to establish such a facility in Baltimore in 1917. The Western Maryland followed in 1930, and its facility with subsequent improvements can now handle three ships at a time. The Baltimore and Ohio pier was built in 1950 and 1951 and cost $5,000,000. The

capacity of those three piers in Baltimore is 13,500,000 tons per year, based on a 15% use of specially designed ore carrier type ships, and if the use of such ships is raised to 65% the total capacity will be increased to 22,275,000 tons per year. These facilities were constructed while the differential was in effect.

In March 1954, the Pennsylvania completed the first stage of its unloading facility at a cost of $11,000,000. The capacity is from 3,000,000 to 6,000,000 tons of ore, depending on the type of ship. An enlargement, which would have increased the capacity of the facility by 50%, was ordered in 1954 and scheduled to be finished in 1955. The Pennsylvania contemplates an ultimate expansion which would enable it to treble its original capacity. It estimated that it needed 2,500,000 additional tons of ore per year to maintain its Philadelphia pier profitably. These facilities were established while there was parity of rates between Baltimore and Philadelphia on traffic moving to Pittsburgh.

Bethlehem at Sparrows Point and the United States Steel at Fairless each has its own unloading facility. The first has been in operation since 1946 and the latter since January 1953.

New York and Boston have no modern ore unloading facilities and only a very small tonnage of iron ore passes through these ports. Without parity of rates with Philadelphia and Baltimore no facility is planned at either location.

The relation of the rates to the distances for which iron ore is transported from the Atlantic ports to the differential territory is a factor necessary to be considered in this case since § 3 of the statute forbids a carrier to give any undue or unreasonable preference to any port or locality, or to subject any port or locality to any undue or unreasonable prejudice. The short line distances of the railroads from the several ports to Youngstown, Ohio, that is, the shortest physical routes over which traffic may

be moved without transfer of lading, although through rates and routes may not be published, are as follows:

TO YOUNGSTOWN, OHIO

From	Short Line Distance Miles	Difference in Distance over Baltimore Miles
Baltimore	378	—
Philadelphia	424	46
Morrisville	437	59
New York	490	112
Boston	646	268

The short tariff route distances between these points, that is to say, the shortest routes from each port over which rates on iron ore are actually published, are as follows:

TO YOUNGSTOWN, OHIO

From	Short Tariff Route Miles	Excess Over the Shortest Tariff Route from Baltimore (W. Md.—381 Miles)
Philadelphia:		
P.R.R.	428	47
Morrisville:		
P.R.R.	441	60
New York:		
Erie	569	188
N.Y.C.	612	231
Boston:		
N.Y.C.	670	289
B&M	661	280
N.Y., N.H., & H.	692	311

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For reasons of convenience, the Pennsylvania moves iron ore traffic over longer and more circuitous routes from both Philadelphia and Baltimore to Youngstown. The route which it uses from Philadelphia (434 miles) is practically the same as its short tariff route therefrom (428 miles); but instead of using its short tariff route of 404 miles from Baltimore, it carries the shipments 423 miles through Perryville, Maryland. If its actual operating route from Philadelphia is compared with its actual operating route from Baltimore, the difference in distance is only 11 miles; but if this operating route from Philadelphia is compared with the short operating route from Baltimore—that of the Western Maryland Railroad—Philadelphia's excess distance is 53 miles.

The decisions of the Commission are set forth in the report of Division 2 on February 5, 1954, 291 I. C. C. 527, and the report of the full Commission on October 1, 1956, 299 I. C. C. 195. The latter dealt principally with additional evidence adduced in the interval and seems to have adopted the report of Division 2 except that it approved the new schedules from New York to the Youngstown area which Division 2 had rejected. The reports recite in considerable detail the history of the differential, hereinbefore set out, and the contentions of the opposing sides;[9]

[9] The Commission notes the contentions of the Pennsylvania that parity between Baltimore and Philadelphia is necessary so as not to stifle the importation of iron ore through Philadelphia and so as to enable the steel producers to make proper use of the new facilities at Philadelphia; that the differential was never intended to apply to low-grade bulk material and hence parity did not constitute a departure from the former practice; that Baltimore did not object to parity with Philadelphia on traffic moving to the Pittsburgh area for 50 years and that all imported iron ore moves through Pittsburgh; that the commercial interests of Baltimore will not be injured since parity as far as the Pittsburgh area has not disrupted the general port differential adjustment and the great increase in imports of iron ore will provide ample tonnage for Baltimore's unloading facilities. On the other hand, the Commission takes cognizance of the contentions that interests serving the port of Baltimore are entitled to reap the natural advantages flowing from its location; that parity would deprive Baltimore of these advantages

and the findings of the Commission, which are sometimes mingled with the statement of the contentions of the parties, and the ultimate conclusions of the Commission are then set forth. They may be summarized as follows:

It is shown by a statement filed by the Pennsylvania in support of its claim to parity, which the Commission seems to have found correct, that parity of rates on iron ore applies both from Baltimore and Philadelphia to Steeltown, Pennsylvania, a steel producing point east of Pittsburgh; also from Baltimore and Philadelphia to Buffalo, although the route from Baltimore over the Baltimore and Ohio is 190 miles and that over the Western Maryland is 165 miles longer than the route from Philadelphia over the Pennsylvania. A similar comparison is made between routes from Baltimore and routes from Norfolk to steel mills in Ohio and Michigan as to which parity prevails, although the distances from Norfolk are from 25 to 192 miles longer than the distances from Baltimore. Likewise parity of rates but disparity of distances exist in rates from Lake Erie ports to steel mills in the Youngstown and Wheeling areas, as to which reference is made to the decision of the Commission in *Iron Ore Rate Cases,* 41 I. C. C. 181, in which the Commission pointed out that blast furnaces must be operated continuously and that it is of advantage to the steel producers and also to the operators of the vessels to have more than one port available. It was also shown that there is a movement of large quantities of eastbound ore from Erie and Buffalo to the steel mills at Bethlehem, Fairless, Philadelphia and Spar-

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and place the entire port differential rate structure in jeopardy by giving rise to demands for reduced rates on other imported bulk commodities; that the earnings on tonnage carried from Baltimore was substantially greater than on tonnage carried from Philadelphia to the differential territory because of the shorter distances from the former port; that parity of rates on iron ore from Baltimore and Philadelphia to Pittsburgh during the past 50 years should be disregarded because there was no movement from Philadelphia to Pittsburgh under this schedule.

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rows Point under a parity rate of $2.71—notwithstanding he inequality of distances; and it was said that the earnngs under the proposed rates from Philadelphia to steel nills in the Youngstown area compare favorably with the earnings under the $2.71 rate from Erie and Buffalo to eastern furnaces.

In both reports the Commission seems to have approved the contention of the Pennsylvania that there are only 11 miles difference between the transportation routes from Philadelphia and Baltimore to the differential territory and, therefore, the services from both ports are substantially identical. In its final report the Commission said:

> "The Pennsylvania urges also that rates from Philadelphia the same as those from Baltimore are justified by mileage and service factors. The average tariff-route distances over the Pennsylvania to the 17 destinations in differential territory are 422 miles from Philadelphia and 398 miles from Baltimore. Based on these distances, the equalized rates yield average ton-mile revenues of 6.4 mills from Philadelphia and 6.7 mills from Baltimore. The actual operating route of the Pennsylvania from Philadelphia is only 11 miles greater than its actual operating route from Baltimore. In both instances, the movement is via Pittsburgh, and approximately 75 percent of either haul is over the same tracks. Thus, the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore."

This statement seems to say that, in considering difference of distance between Baltimore and Philadelphia, the comparison should be made between the Pennsylvania's direct route from Philadelphia and its unnecessarily long route from Baltimore via Perryville, rather than between

the tariff route of the Pennsylvania from Baltimore and the corresponding routes of the Baltimore railroads from Baltimore.

Division 2 of the Commission had little to say about the movement of the Labrador deposits because they had not begun to move prior to February 5, 1954, when the report was filed. The Commission merely quoted an owner of stock in the Iron Ore Company of Canada as saying that five or six million tons of ore will be available for shipment in 1955 and that 10,000,000 tons are likely to be shipped in 1956. It is also pointed out that vessels of eighteen to twenty-eight thousand tons capacity will be used in transporting the ore to the north Atlantic ports; that a large number of railroad cars will be required; that economic necessity will require the movement to take the route from Seven Islands to the mills entailing the lowest transportation costs; and that alternate ports at equal rates are required in order to avoid congestion and to give the steel mills the opportunity to select the port to be used.

In the Commission's report, reference is made to its opinion *In the Matter of Rate Differentials,* 11 I. C. C. 13, which considered the Baltimore differential in 1905. The Commission said that at that time ocean rates favored the northerly ports but now iron ore moves in both chartered vessels and vessels owned by steel companies, and since 1920 ocean rates generally have been equalized with respect to voyage charters to the north Atlantic ports, but in some circumstances there is a saving of cost in routing the ore to the port nearest point of origin and that this might be true on a time charter arrangement or for an integrated shipper. The Commission then pointed out the approximate ocean distances from various points of origin to the Atlantic ports and also set out the figures which showed the amounts of Labrador ore

received at Baltimore and at Philadelphia in the period from July 31 to December 5, 1954. The Commission, however, made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore. The Commission's figures as to the tonnage received at these two ports is limited to the period from July 31 to December 5, 1954, and no evidence was offered or considered as to the shipments during the year 1955 and 1956 preceding the date of the Commission's decision. The Commission did not pass on the testimony heretofore referred to in this opinion indicating that Labrador ore would seek the port offering the lowest cost of transportation from the point of origin to the destination in steel producing territory.

The Commission did not undertake to appraise the relative weight of the various factors entering in its decision, but Division 2 stated the following general conclusions with respect to the proposed rates from Philadelphia, New York and Boston:

"The evidence in support of the proposed adjustment from Philadelphia is substantially stronger than that offered in behalf of the proposed rates from New York and Boston. We are convinced that, in view of the earnings that would be yielded by the suspended rates from Philadelphia, such rates are not below a minimum reasonable level. We are of the view further that establishment of the proposed rates from Philadelphia will not result in disrupting the existing port relationship on traffic generally to destinations in differential territory. As indicated, the rates on iron ore from Baltimore and Philadelphia to the Pittsburgh area have been on a parity for over 50 years without disturbing the port relationship on

the other commodities, and no good reason appears why the extension of this parity to ore-consuming points beyond Pittsburgh should change this situation. The record is persuasive that the iron ore tonnage through Baltimore will probably continue to increase regardless of the movement through Philadelphia.

"Moreover, in administering the provisions of the act the Commission is required to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. The evidence is certain that in the years to come a large proportion of the iron ore used in this country will originate in foreign countries. This iron ore is and will be an important factor in national defense. Especially in case of national emergency, it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port which could be incapacitated through congestion or other cause, and that, in the interest of national defense, Philadelphia and Baltimore be placed on a rate parity on imported iron ore as proposed in the schedules filed to become effective on February 19, 1953. Such a parity would not result in undue preference or prejudice."

Division 2 reached the ultimate conclusion that the proposed rates from Philadelphia to the differential territory were just and reasonable but that the rates from New York and Boston were not shown to be just and reasonable.

The general conclusions of the full Commission reaffirmed Division 2 with respect to rates from Philadelphia. They found that a substantial increase in iron ore im-

ports would continue in that Labrador tonnage would increase to 10,000,000 tons in 1956 and to a greater extent in later years, and that the tonnage through Baltimore would probably continue to increase notwithstanding the maintenance of a parity rate with Philadelphia and also with New York. The Commission also reaffirmed the conclusions of Division 2 with respect to the necessity for parity in carrying out the national transportation policy. In this respect it said:

> "As stated in the prior report, we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its full share of the transportation burden, but it is of vital importance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports. These matters, among others of record, have been given consideration in reaching our conclusions herein."

New York and Boston rates:

The railroads serving New York and Boston pointed out the importance of being allowed to share in the new traffic based upon the importation of iron ore so as to replace the large revenues now received from domestic iron ore moving eastward from the Minnesota-Michigan ranges. The railroads also stressed the fact that business interests could not be expected to invest capital in con-

structing unloading facilities at New York or Boston unless parity of rates was established with Baltimore and Philadelphia, enabling the more northerly ports to share in the business; and they also emphasized the importance of having one or more ports available to handle the new importations.

Division 2 of the Commission, however, pointed out the greater distances from New York and Boston to the differential territory and resulting in the smaller earnings at these ports under parity of rates. It said:

> "* * * From New York and Boston to the 7 destinations in the Youngstown area, the short-line distances average 487 and 642 miles, respectively, whereas to the same destinations the short-line distances average 424 miles from Philadelphia and 380 miles from Baltimore. The average short-line distance from Philadelphia exceeds that from Baltimore by only 11.6 percent whereas the like distances from New York and Boston are greater by 28 and 70 percent, respectively, than the distance from Baltimore.
>
> "The proposed rates from Philadelphia compare favorably with rates applicable on iron ore from and to points in central and trunkline territories and thus come within the 'zone of reasonableness' to which reference is made in *New York Central R. Co.* v. *United States, supra.* The proposed rates from New York and Boston would produce substantially lower revenues from those from Philadelphia. Moreover, the record shows that the facilities at New York and Boston are not adequate for the unloading of iron ore in substantial lots, and there is no positive indication that adequate facilities would be constructed thereat or that any substantial movement through those ports under the proposed rates could be expected. We conclude that, in the circumstances, the

proponents of the proposed rates from New York and Boston have not sustained the statutory burden placed upon them to prove that these rates are just and reasonable."

Subsequent to the decision of Division 2 additional testimony was taken in which witnesses for the Boston and Maine and the New York, New Haven and Hartford indicated that unloading facilities would be established at Boston if equal rates with Baltimore were permitted, and similar representations as to the establishment of facilities at New York were made by persons interested in the development of that port. It was however made clear by all of the witnesses that facilities would not be established without assurances of parity of rates.

The Commission then made a comparison of revenues from the four north Atlantic ports to destinations in the Youngstown area. In one computation, using short-line distances, the following tabulation was made of the car-mile and ton-mile revenues on an average load of 62 gross tons and the rate from Baltimore of $3.035, which included the *Ex-Parte* No. 175 increase, *i.e.*, a general increase applied by the Commission to all the rates:

From:	Short-Line Distances Miles	Car-Mile Cents	Ton-Mile Mills
Baltimore	378	49.8	8.0
Philadelphia	424	44.4	7.2
New York	490	38.4	6.2
Boston	646	29.1	4.7

The Commission then considered certain cost studies submitted by the Erie Railroad for the single line haul from New York to Youngstown and for the joint haul with other railroads from Boston, and stated the final conclusion:

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"We have carefully considered all of the evidence pertaining to the estimated out-of-pocket cost from New York and Boston. After restating the costs on the bases indicated, including the distribution of the costs of freight-train repairs, depreciation, and rentals of other than mileage cars over freight-train car-miles, loaded and empty, and the application of the unit cost to the loaded and empty car-miles of the imported ore traffic, we conclude that $2.647 and $3.42 would more nearly approximate the out-of-pocket costs per gross ton from New York and Boston, respectively. On these bases, the rate of $3.035 would exceed the cost from New York by 38.8 cents per gross ton, but would be 38.5 cents less than the cost from Boston."

On this basis the Commission found that the Baltimore rate would be just and reasonable as applied to New York, but would not be just and reasonable as applied to Boston.

The Commission also found that the $2.51 rate from Baltimore to Youngstown proposed by the Baltimore railroads as of February 16, 1953, would not be just and reasonable despite the fact that a comparison of the car-mile and ton-mile revenues via short line distances under the $2.71 rate (without the *Ex-Parte* No. 175 increase) from New York to Youngstown, with similar revenues under the $2.51 rate from Baltimore, shows that the latter would exceed the former. The comparison is shown by the following table:

TO YOUNGSTOWN, OHIO

From:	Rate	Car-Mile Cents	Ton-Mile Mills
Baltimore	$2.51	41.2	6.6
New York	2.71	34.3	5.5

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In general, the Commission concluded that the natural advantages to which the Port of Baltimore would ordinarily be entitled were outweighed by the need to maintain ports of entry for iron ore at Philadelphia and New York and that this should be accomplished by diverting traffic from Baltimore to the other ports to such an extent that the facilities already established at Philadelphia may be more extensively and profitably used, and so that New York would be encouraged to build facilities which it does not now possess.

The weight to be given to the administrative findings of the Commission and the scope of the authority of the reviewing court are well established. The expert judgment of the Commission in respect to matters in the field committed to it by Congress must be recognized and its conclusions, if supported by substantial evidence on the whole record, must be accepted. The Court is not at liberty to substitute its judgment for that of the Commission. As was said in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the

facts further than to determine whether there was substantial evidence to sustain the order."

The Commission is not required to make detailed findings of fact but must make the basis of its decision clear so that the reviewing court may perform its function. The matter was well stated by Judge Magruder in *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394, 400, affirmed 342 U. S. 890:

"In Beaumont, S. L. & W. Ry. Co. *v.* United States, 1930, 282 U. S. 74, 86-87, 51 S. Ct. 1, 75 L. Ed. 221, the Supreme Court, while upholding a Commission order, took occasion to criticize the Commission for the unnecessary burden cast upon the reviewing court by failure of the Commission to include in its report a complete statement showing the grounds upon which its determinations rested. Just how far the Commission is obliged by statute to go in this particular is not so clear as it might be. The Commission does have the duty to set forth in its report the 'basic' or 'essential' or 'quasi-jurisdictional' findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree. United States *v.* Chicago, M., St. P. & Pac. Railroad Co., 1935, 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; United States *v.* Baltimore & Ohio Railroad Co., 1935, 293 U. S. 454, 463, 55 S. Ct. 268, 79 L. Ed. 587; Florida *v.* United States, 1931, 282 U. S. 194, 215, 51 S. Ct. 119, 75 L. Ed. 291."

See also *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504-5; *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 211-2; and *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 653.

where the failure of the Commission to explain adequately its departure from prior norms led to a remand of the case for more explicit findings.

The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the striking down of the long established differential in favor of Baltimore in order to enable Philadelphia and New York to have a share of the traffic and thereby insure their maintenance as ports of entry for the product.

The Commission in reaching its conclusions must of course give effect and adhere to the national transportation policy declared by Congress, which provides for the promotion of sound economic conditions among the several carriers and the establishment of reasonable charges for transportation services without unjust discrimination, undue preferences or advantages and without unfair or destructive competitive practices, to the end that a national transportation system may be built up, adequate to meet the needs of the commerce of the United States and of the Postal Service and of the national defense. See Preamble to 49 U. S. C. §§ 1, 301, 901 and 1001. However, in effecting this policy it is made unlawful for any carrier to give any undue or unreasonable preference to any person, locality or port, or to subject any person, locality or port to undue or unreasonable prejudice or disadvantage. 49 U. S.C. § 3(1). The statute also provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carrier, proposing the rate to show that it is just and reasonable. 49 U. S. C. § 15.

In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its

conclusions and whether there was substantial evidence to support the findings. In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore. This ruling, moreover, has upset a railroad and Commission practice of many years duration in which the factor of distance was given effect. Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *New York* v. *United States,* 331 U. S. 284, 305; *United States* v. *Illinois Central,* 263 U. S. 515, 52[illegible].

What are the findings upon which the Commission relies as the basis for its conclusion that there should be parity of rates between the ports notwithstanding the factor of distance? As to Philadelphia and Baltimore they seem to be:

1. That there is parity in respect of rates between Baltimore and Philadelphia as to other routes which involve differences in distance;
2. That in any event the difference in distance to the differential territory, measured from Philadelphia and Baltimore, is so insignificant that it should be disregarded, and
3. That the needs of the producers of steel and the requirements of the Postal Service and of the national defense make essential the maintenance of a plurality of ports for the importation of iron ore into the United States.

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The propriety and sufficiency of these findings must be appraised against the historic background in which the differential in favor of Baltimore has been maintained. Undoubtedly it originated in the natural advantages derived from the shorter distance of the port to destinations in the west and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports not only by practical railroad men but by impartial governmental authority in control. This practical solution of the difficulties arising from competition was based on solid legal ground, for it is settled that the law does not attempt to equalize opportunities among localities and that the natural advantage which belongs to a locality does not constitute a preference. *United States* v. *Illinois Cent. RR. Co.*, 263 U. S. 515, 524; *New York* v. *United States*, 331 U. S. 284, 331-2; *Alabama G. S. R. Co.*, v. *United States*, 340 U. S. 216, 229. The Commission itself is without authority to adjust rates and differentials for the purpose of diverting traffic from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another. *Texas and Pacific R. Co.* v. *United States*, 289 U. S. 627, 639.

This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may not reduce its rates to meet competition within the zone of reasonableness, but differences in rates based upon differences in length of haul, density of traffic and other elements of the cost of service are within a long standing practice of rate making, and a rate may not be filed for the purpose of diverting traffic from one locality in order to build up another. *Texas and Pacific R. Co.* v. *United States*, 289 U. S. 627, 636, 639. Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *New York* v. *United States*, 331 U. S. 284, 297, 298. The Commission in reaching its conclusion must con-

sider all of these factors and may not condemn a difference in rates "unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Cent. R. R. Co.*, 263 U. S. 515, 524.

In passing upon the merits of the case, the Commission gave no consideration to the cost or value of the services of the railroads competing for traffic at Philadelphia and Baltimore. No evidence on these points was offered or required; but the ultimate finding of the Commission as to distances from Philadelphia and Baltimore to Central territory was that the difference is so insignificant that the service from both ports is substantially identical. Evidence to support this finding seems to us to be lacking. Not only does the disparity, which had been considered substantial for many years, still exist, but the only standard of measurement proffered by the Commission for its finding was obviously incorrect. The Commission declared that the actual operating route from Philadelphia to Central territory is only 11 miles greater than the operating route from Baltimore. This seems convincing until it appears, from a careful reading of the decision, that the Commission is comparing the distance via the Pennsylvania from Baltimore with the distance via the Pennsylvania from Philadelphia and that in doing so it measures the distance from Philadelphia over a direct route, but measures the distance from Baltimore over a circuitous line through Perryville, which the railroad company adopts for its own convenience. Clearly this treatment was wrong. The comparison should be made on the same basis in each instance, for example, between the short line distances or between the short tariff distances from both ports, which shows a difference of 47 miles in the one case and 24 miles in the other. It is fair to say that the Commission, contrary to its former policy, either gave no weight whatever to the factor of distance or found that it

was overborne by the general policy of supplying the needs of national commerce and the requirements of national defense.

We do not overlook the existence of parity of rates despite disparity of distances in respect to other commodities over other routes to which the Commission referred in its decision, seemingly as precedent for its present action. There was nothing new in this situation. These other rates had long existed but in spite of them the differential in favor of Baltimore on traffic moving to the Central territory had been maintained and carriers serving the port in reliance upon it had adjusted their rates and provided and maintained adequate facilities. We think that these other rates furnish no reasonable basis for change of view on the part of the Commission.

It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system. How far the Commission's authority extends in this direction is an interesting and important question. The respondents stress the passage of the Act of September 18, 1940, 54 Stat. 899, whereby the Act to regulate commerce was amended to include the introductory declaration of the national transportation policy. This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the enforcement of all the provisions of the statute.[10] No one suggests, however, that the Commission has general authority to build up the transporta-

[10] *Luckenbach S.S. Co. v. United States*, 122 F. Supp. 824, affirmed, 347 U. S. 984; *Atlanta & St. Andrew's Bay Ry. Co. v. United States*, 104 F. Supp. 193; *United States v. Great Northern R. Co.*, 343 U. S. 562, 576; *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472.

tion system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

For our purposes it is enough to determine whether there is substantial evidence to support the finding that a radical change in the rates was needed to support the national policy. In the first place, it is to be noted that there is no evidence of financial weakness on the part of the railroads involved as has led the Commission in some cases to fix rates in aid of the financial necessities of certain carriers. See *New England Divisions* case, 261 U. S. 184. The decision of the Commission is based on the general conclusion that the northerly ports will have no share in the transportation of imported iron ore so long as the differential exists because ocean freights have been generally equalized since 1920 and the ore will inevitably be shipped to the port which enjoys the cheapest railroad rate to the interior.

Definite findings are made as to the ocean distances from major sources of iron ore to the north Atlantic ports, which show the distances from Labrador to be 950 miles to Boston, 1187 miles to New York, 1320 miles to Philadelphia and 1470 miles to Baltimore; and it is said that a round trip between Labrador and Baltimore requires about three more days than a round trip between Labrador and Boston. The Commission, however, does not attempt to review the considerable body of testimony bearing on the relative costs of ocean travel to the several destinations. A witness is quoted as saying that at the present time iron ore from foreign ports moves both in vessels

owned by the steel companies and in chartered vessels; that charter agreements may be voyage charters or time charters; that the ocean rates of voyage charters are equalized to all North American ports; but that in some instances there is a cost saving in routing ore to the nearest port "on a time charter or for an integrated shipper."

These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore. There was direct testimony that water costs bear a direct relationship to the time spent in transit; that the investments in large ore carrying vessels and operating costs are high, ranging from $1000 to $2000 per day; that the shipping season from Labrador is short and that time consumed in making round trips is an important element in moving the maximum tonnage to the destination; that vessels under a time charter and vessels owned by the steel companies would be routed to the nearest port, all other factors being equal; and that the ownership of vessels by the steel companies is expanding. The weight of all this testimony tends strongly to support the view that ocean costs will be an influential if not a determining factor in selecting the ports of destinations, which basis is lacking for the general conclusion of the Commission that without parity of rates Philadelphia will have no share in the traffic. On the contrary, shipments during a few months in 1954, the only period considered, indicate that under parity the ore will go to Philadelphia rather than to Baltimore, since Philadelphia enjoys the double advantage of smaller ocean costs and the most modern unloading facilities.

In the absence of specific findings, it does not seem reasonable to destroy a long established differential on the strength of which the railroads serving Baltimore have made large investments and the commercial interests of the port have made their arrangements. Obviously it

is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to greatly increase. The port will still be entitled to the benefits of its geographical position and the expected profits of the new business may not be diverted merely to satisfy the desire of other ports to share therein.

We think, however, that the record furnishes a reasonable basis for the decision of the Commission to retain parity of rates between Baltimore and Philadelphia in respect to traffic to Pittsburgh. Similar reasons for the maintenance of the status quo apply as in the case of Baltimore. It is true that, so far as iron ore is concerned, only a paper rate was involved until recently; nevertheless, parity has existed for more than 50 years with the acquiescence of Baltimore, and it was retained without objection in the revision of rates in 1950 when the rate of imported iron ore from Philadelphia to the Pittsburgh area was reduced by the same amount as the rate from Baltimore. While there had been no significant movement of iron ore from Philadelphia to the steel mills in the Pittsburgh area during this period, there was, as the report of Division 2 of the Commission shows, a substantial movement from Baltimore to this district. The Pennsylvania Railroad announced its intention, in August 1951, to erect a modern unloading facility in South Philadelphia with the obvious purpose to share in this traffic and in its expected increase, but no objection to the existing parity of rates came from the Baltimore railroads until they made their tactical move in 1953 in order to preserve the consistency of their position.[11] In our opinion, it is of great significance that

[11] The respondent railroads contend that parity as to Pittsburgh is inconsistent with the differential as to the Central territory, pointing out that Youngstown, one of the points in that territory, is 66 miles distant from Pittsburgh over the Pennsylvania Railroad as compared to 76 miles over the Baltimore and Ohio. This incongruity, however, does not present a new element for it has existed throughout the history of the differential and, in any event, we are concerned not with the comparative distances from Pittsburgh but with comparative distances from the ports of Philadelphia and Baltimore.

Philadelphia interests have made a large capital investment in providing unloading facilities in the belief that the historic situation would be retained; and it would be unreasonable at this time to deny them the opportunity to make use of the structure which they have set up.

The lack of substantial basis for the allowance of parity to the Port of New York is shown by what has already been said; but it may be added that the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to considerations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs by 38.8 cents per ton. For this reason alone the rate was found to be just and reasonable; and yet in the same opinion the Commission found that the rate of $2.51 from Baltimore, proposed by the Baltimore railroads to take effect February 16, 1953, that is to say, 20 cents under the current rate, would not be just and reasonable, although the evidence shows that the return thereon would exceed the return on the New York rate which the Commission approved. As the four dissenting commissioners point out, the only justification in the record for the proposed rates from New York "is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore."

We conclude (1) that the orders of the Commission should be affirmed insofar as they disapprove the schedules filed to become effective on February 16, 1953, proposing reduced rates from Baltimore to the Pittsburgh and Central areas, and the schedules filed to become effective on February 16, 1953 and March 11, 1953 from Philadelphia to the Pittsburgh and Central areas, respectively; and (2) that the orders be vacated insofar as they ap-

proved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined; and (3) that, insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect; and (4) that, pending said findings and a decision based thereon, parity between the ports of Philadelphia and Baltimore be retained upon the assumption that steps be taken to secure a prompt determination.

The orders of the Commission are modified and the case is remanded to the Commission for further proceedings consistent with this opinion.

We concur in this opinion:

/s/ W. Calvin Chestnut,
United States District Judge.

/s/ R. Dorsey Watkins,
United States District Judge.

APPENDIX B

DECREE.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND

The Baltimore and Ohio Railroad Company, Canton Railroad Company, Western Maryland Railway Company, Baltimore Association of Commerce, The Baltimore Chamber of Commerce, The Steamship Trade Association of Baltimore, Inc., Baltimore Custom House Brokers and Forwarders Association, the Mayor and City Council of Baltimore,

Plaintiffs,

v.

United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company, and C. W. Boin, Agent, and The New York Central Railroad Company and Erie Railroad Company,

Defendants.

Civil Action
No. 9237

This 22nd day of May 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points,* should be (1) in part vacated and the continuance and enforcement of said part enjoined,

(2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed; TO WIT, it is:

ORDERED, ADJUDGED AND DECREED

1. That the order of the Interstate Commerce Commission dated October 1, 1956 is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorizes the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956 enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956 insofar as it approves the tariff schedules of The Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953 is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the Opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective February 9, 1953 be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953 and March 11, 1953.

/s/ MORRIS A. SOPER,
Circuit Judge.

/s/ W. CALVIN CHESTNUT,
District Judge.

/s/ R. DORSEY WATKINS,
District Judge.

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of October, A. D. 1956.

INVESTIGATION AND SUSPENSION DOCKET No. 6074

IRON ORE FROM EASTERN PORTS TO CENTRAL FREIGHT ASSOCIATION POINTS

It appearing, That on February 5, 1954, division 2 made and filed its report in the above-entitled proceeding, 291 I. C. C. 527, and found the schedules filed to become effective on February 9, 1953, proposing reduced rates on iron ore, in carloads, from Philadelphia, Pa., to destinations in the Wheeling, W. Va., and Steubenville and Youngstown, Ohio, areas just and reasonable, but found the other schedules not shown to be just and reasonable and ordered them canceled, and also denied fourth-section application No. 27721 filed in connection with certain of the rates;

It further appearing, That the Commission, on July 30, 1954, reopened the proceedings for further hearing;

It further appearing, That by order dated October 11, 1954, we entered upon a hearing concerning the lawfulness of additional schedules as enumerated therein filed by other carriers proposing reduced rates on iron ore, in carloads, from Boston, Mass., to destinations in the Youngstown area, and suspended the operation of said schedules until May 21, 1955, and that the respondents have postponed the operation thereof indefinitely;

And it further appearing, That a full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed a report on further hearing, which report and the aforesaid report of February 5, 1954, are hereby referred to and made a part hereof:

It is ordered, That the order of division 2 entered herein on February 5, 1954, be, and it is hereby, vacated and set aside, and that the respondents herein be, and they are hereby, notified and required to cancel the schedules found not shown to be just and reasonable in the said report on further hearing, on or before October 29, 1956, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

FOURTH SECTION ORDER NO. 18483

IRON ORE—BALTIMORE, MD., TO DONORA AND MONESSEN, PA.

By Fourth Section Application No. 27721, filed by Agent C. W. Boin for and on behalf of The Baltimore and Ohio Railroad Company and The Pittsburgh and West Virginia Railway Company authority is sought to establish and maintain rates on iron ore, in carloads, from Baltimore, Md., and points taking the same rates, to Donora (Baird) and Monessen, Pa., over routes as described therein, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act. A hearing having been held and full investigation having been made, and the Commission, on the date hereof, having made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report and application are hereby referred to and made a part hereof:

It is ordered, That the said application be, and it is hereby, denied.

By the Commission.

HAROLD D. MCCOY,
Secretary.

[SEAL]

APPENDIX D

The National Transportation Policy (49 U. S. C., preceding §§ 1, 301, 901, 1001) reads as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(5) of the Interstate Commerce Act (49 U. S. C. §1(5)) reads as follows:

"(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Appendix D

Section 3(1) of the Interstate Commerce Act (49 U. S. C. §3(1)) reads as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 14(1) of the Interstate Commerce Act (49 U. S. C. §14(1)) reads as follows:

"(1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 15(1) of the Interstate Commerce Act (49 U. S. C. §15(1)) reads as follows:

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation

and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(7) of the Interstate Commerce Act (49 U. S. C. § 15(7)) reads as follows:

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint

rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may

by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 15a(2) of the Interstate Commerce Act (49 U. S. C. § 15a(2)) reads as follows:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 464

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Appellees.

On Appeal from the United States District Court for the District of Maryland

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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NOVEMBER 6, 1957

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 464

The Pennsylvania Railroad Company,
Appellant,

v.

The Baltimore and Ohio Railroad Company, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

This brief is filed by appellant, pursuant to Rule 16, paragraph 3, of the Revised Rules of the Supreme Court, in opposition to the motions to affirm filed by appellees, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, Canton Railroad Company, and Maryland Port Authority and Baltimore Association of Commerce, to the extent that such motions are directed to this appeal.

STATEMENT

As stated in appellant's Jurisdictional Statement, and as seems to be conceded by appellees, this appeal does not require the Court to examine and re-evaluate the evidence. The questions presented relate to the basic issues as to the respective responsibilities of the Interstate Commerce Commission and a court reviewing its orders. Indeed, the motions to affirm serve rather to underscore the substantial nature of the questions raised by this appeal—(1) whether the District Court misconstrued the order of the Commission and failed properly to evaluate the Commission's findings, (2) whether the District Court failed to respect the doctrines of primary jurisdiction and administrative finality, and (3) whether the District Court erred in interpreting and in applying to the evidence in this case the provisions of the Interstate Commerce Act and of the National Transportation Policy.

ARGUMENT

The Jurisdictional Statement has fully set forth the essential bases which we believe warrant full briefs and argument in this Court, and no purpose would be served in repeating those considerations. We shall confine ourselves here to correcting several misapprehensions which appellees appear to have as to the nature of the issues, the action of the Commission, and our own position on these matters.

1. Our Jurisdictional Statement (pp. 9-10) demonstrated that the District Court had misconstrued the Commission's order in stating that the Commission "prescribed" a parity of rates from Baltimore and Philadelphia and that this misunderstanding led the District Court into serious error in determining whether the decision of the Commission should be sustained. Appellees Baltimore

and Ohio and Western Maryland, while not denying the significance of such a misunderstanding, are now driven to contend that the word "prescribe" describes the substance of what the Commission did, for, they say, the Commission required or "prescribed" a parity by approving rates from Philadelphia equal to the Baltimore rates and by disapproving lower rates from Baltimore (pp. 12-13).

The fallacy of that position is exposed ten pages later in the same document. With respect to the New York rate, which was also published at the Baltimore level, and also approved by the Commission, those appellees assert that "the only action taken by the Commission was to approve [such rate] as 'just and reasonable' under Section 15(7)" and that "The Commission did not prescribe parity as a principle" (pp. 23-24). Moreover, with respect to the rates from Baltimore and Philadelphia, it cannot be denied that the lower court affirmed the Commission's finding that the reduced Baltimore rates were not shown to be just and reasonable, from which affirmance said appellees did not appeal.

Despite appellee's contradictory interpretations of what the Commission did, the fact remains that the lower court stated in so many words that the order of the Commission "prescribed" a parity of rates from Baltimore, Philadelphia and New York, and then proceeded to determine whether the Commission was right in so prescribing such relationship. In so doing, the court ignored the fact that the Commission merely passed on the validity of carrier-initiated rates under Section 15(7), and that, as shown in appellant's Jurisdictional Statement, the Commission considered and applied accepted standards, and made adequate basic findings with respect thereto, in reaching its ultimate findings that the Philadelphia rate was just and reasonable and that the reduced Baltimore rate was not shown to be so. See *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394, 398-399, affirmed 342 U. S. 890.

Nor are appellees successful in excusing this fundamental error by the lower court through the argument that the controversy herein turns on port relationships.[1] Our Jurisdictional Statement (pp. 10-12) showed how the lower court erred in holding that the Commission had struck down a long-established differential in favor of Baltimore to divert traffic to the other ports and in the effect given by the court to such interpretation of the Commission's decision. Appellees' motions in no way refute this showing of error. Certainly, the continuous repetition of the words "traditional differential", as it appears in appellees' motions, is of no significance here.

Appellees Baltimore and Ohio and Western Maryland attempt to rebut appellant's statement that the port differential adjustment has not applied to low-grade, heavy loading, raw materials moving in volume in open-top cars, such as iron ore, coal and coke, by referring to past rate proposals applying the differential to import iron ore rates, which they say the Pennsylvania has sponsored, citing the testimony of a Western Maryland witness (13). Upon cross-examination, this witness was forced to admit that said rate proposals related, not to movements in volume of iron ore to blast furnaces, but to sporadic small movements to other than steel producing plants for use such as making a coating for welding rods (I. C. C. Rec. at 678-686). Iron ore rates, involving large and regular movements, like coal and coke, have always been made on bases different from those affecting merchandise traffic, and have never been made to reflect port differentials (I. C. C. Rec. at 747).

What appellees would ignore is that the rates in issue before the Commission were new rates, occasioned by a change in the movement of iron ore to the destinations involved (see appellant's Jurisdictional Statement, pages 4-7). In fact, from the appellees Maryland Port Authority and Baltimore Association of Commerce motion it would

[1] Motion of B. & O. and W. Md. at pp. 8, 12-13; Md. Port Auth. at 4.

appear that the Baltimore rates which the Pennsylvania sought to equalize from Philadelphia had been in effect for a long time (5), instead of only 28 months before the Pennsylvania's tariff was published to become effective. The traffic was new traffic and the Pennsylvania initiated rates to participate in it as it was entitled to do. *New York Cent. R. Co.* v. *United States, supra,* at 398. It was the lawfulness of such carrier-initiated rates upon which the Commission decided. In so doing it did not "prescribe" a rate parity nor did it "strike down" a port differential rate adjustment.

2. Appellees Baltimore and Ohio and Western Maryland state that this appellant argued that the District Court would require rate relationships to be governed by differences in distance, and claim that the decision of the lower court was misunderstood (13). Our argument was apparently misunderstood. At the part of this appellant's Jurisdictional Statement to which appellees made reference, appellant argued that the District Court had usurped the administrative function in making findings contrary to those of the Commission regarding the weight to be accorded to differences in distances from Philadelphia and Baltimore to the destination territory (Juris. St., p. 14).

The District Court held that the finding of the Commission as to distances from Philadelphia and Baltimore was that the difference is so insignificant that the service from both ports is substantially identical, and that support for this finding is lacking (151 F. Supp. 258, 275). The court characterized the Commission's decision as finding that the distances via the Pennsylvania from Baltimore and Philadelphia, reflecting a difference of 11 miles, were controlling. The Commission's decision is not susceptible of such interpretation.

While the Commission found that the service over the Pennsylvania is substantially identical from both Phila-

delphia and Baltimore, it also found that the average short-line distance from Philadelphia to the Youngstown area exceeds that from Baltimore by only 11.6 percent and that the difference is less when actual working routes are considered (299 I. C. C. 195, 208). Despite these findings the lower court persisted in referring to the "natural advantages" of Baltimore from a distance viewpoint (151 F. Supp. 258, 272), to which appellees' motions make repeated reference. The Commission found that such differences in distance had no significance rate-wise, either with respect to the reasonableness of the Philadelphia rates or in considering whether they were unduly prejudicial. The court's holdings with respect to distance not only misinterpret what the Commission found but also constitute a substitution of its judgment for that of the administrative body.

Appellees Baltimore and Ohio and Western Maryland assert (14) that instead of requiring adherence to comparative distances, the District Court's remand is for a different purpose, namely, "to determine whether the Commission's according of parity rates to Philadelphia gives to the Pennsylvania a rate lower than necessary to meet the competition under Section 1(5) and to the port itself a rate which is unduly preferential and thus in violation of Section 3(1)." The same argument is advanced by the other appellees. Appellees assert that a shorter ocean distance from Labrador to Philadelphia added to an equal rate to Baltimore inland gives Philadelphia a material competitive advantage, which the District Court would guard against "particularly since there is no justification from a transportation standpoint for a lower rate (distance considered) from Philadelphia" (14-15).

The purpose of the court's holdings with respect to distances is so revealed. In other words, treating this case as a port relationship case—instead of one where, as here, the issue was the lawfulness of carrier-initiated rates—the court has accorded greater weight to differences in

distances, Philadelphia compared with Baltimore, than the Commission in its administrative capacity found that they were entitled. In so doing the court questioned the lawfulness of the Philadelphia rate because of its longer distance from Baltimore to the destination territory and its shorter distance than Baltimore from a particular origin source, Labrador.

On the issue of the reasonableness of carrier-initiated rates under Section 1(5), the Commission found the differences in distances inland from Philadelphia and Baltimore *de minimis*. In so doing, it considered earnings and distances, comparisons with other rates and, pursuant to the requirement of Section 15a(2), the effect of the proposed Philadelphia rates on the movement of traffic. In all instances it found that the Philadelphia rates favorably met these criteria (291 I. C. C. 527, 553, 554). That the proposed Philadelphia rates were no lower than necessary to meet competition is implicit in the Commission's finding that iron ore will not move through Philadelphia to the interior on rates higher than those prevailing from Baltimore. With respect to Section 3(1), the Commission found that the differences in distances from Philadelphia and Baltimore are so inconsequential that a parity of rates would not result in undue prejudice (291 I. C. C. 527, 554). These findings were confirmed by its report and order of October 1, 1956.

Throughout their motions appellees stress the importance of Labrador ore. In fact, they would, in effect, confine this case to that origin. That is what the lower court did, when it undertook to find that iron ore from Labrador will dominate the situation and that under a parity of rates Labrador ore will move through Philadelphia and not through Baltimore (151 F. Supp. 258, 265). These findings are contrary to those of the Commission (291 I. C. C. 527, 554; 299 I. C. C. 195, 197, 200, 202-3, 209). While Labrador ore is important, the rates here involved also apply to iron ore from numerous other foreign

sources, all of which was considered by the Commission in reaching its decision. This included due consideration of past and future tonnages from Labrador, from which the Commission found that iron ore tonnage through Baltimore will probably continue to increase even though a rate parity is maintained at Philadelphia (299 I. C. C. 195, 209). In so finding the Commission had under consideration the matter of ocean distances and costs (299 I. C. C. 195, 198).

Appellees Baltimore and Ohio and Western Maryland argue that the purpose of the remand is to enable the Commission to determine whether a parity of rates puts Philadelphia at a competitive advantage "in disregard of the fact that by the transportation standard Baltimore has the geographical advantage" (20). But the Commission has found that the differences in distance from Philadelphia and Baltimore are of no consequence transportation-wise. Also, the Commission has specifically found, as just noted, with the facts of ocean transportation before it, that no undue preference or prejudice will result from a parity of rates.

In a recent decision, *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, Investigation and Suspension Docket No. 6742, ——— I. C. C. ———, decided October 25, 1957 (mimeographed), in which the question of ocean costs from Labrador to Philadelphia and Baltimore was injected by these appellees, the Commission found the uncontroverted testimony to be that, regardless of whether the ocean movement from Seven Islands is to Philadelphia or Baltimore, the charge to the shipper for a particular vessel is the same, whether it is controlled by the shipper or is under charter or contract of affreightment (Sheet 13).

Nor is there any deficiency in the record before the Commission with respect to the movement of iron ore through Philadelphia and Baltimore as appellees Baltimore and Ohio and Western Maryland would assert

(21-22). The Commission had before it all the tonnages up to December, 1954, when the record was closed, including a sufficient sampling of the movement from Labrador which had begun earlier in that year, and it made detailed findings as to such movements (299 I. C. C. 195, 197, 200, 202-3). These findings supported its finding that the tonnage through Baltimore will probably increase even at equal rates with Philadelphia (299 I. C. C. 195, 209).

Appellees assert that the "fervor with which the appellants resist a disclosure suggests that it would not support a parity of rates." In the view of this appellant a record in administrative proceedings should not be held open indefinitely, particularly where, as here, all parties have been given ample opportunity to make a record before the Commission and on the basis of a full record the Commission has made proper basic and ultimate findings. Reference to the two Commission reports shows that they were not "tailored", as alleged by appellee Canton Railroad Company (2). Nor, as claimed by such appellee, did the Commission carefully avoid findings of fact and content itself with a simple conclusion that the rates in question are or are not shown to be just and reasonable (3). Equally without merit is said appellee's characterization of the Commission's decision as a "fast conclusion" (7). Hearings commenced in March, 1953 and were concluded in December, 1954. There were two examiner's proposed reports, a report by Division 2 and a report by the full Commission. In each of these reports the fullest treatment was given to the issues and the evidence and in each instance the proposed rates from Philadelphia were found to be lawful, with no dissent in either of the Commission decisions. It is submitted that the administrative process in this case could not have been more thorough and that it should now be ended despite the effort of the District Court to usurp the administrative function and remand the matter to the Commission for confirmation of its own contrary findings.

3. Regarding the District Court's refusal to accept the Commission's findings that a parity of iron ore rates, Philadelphia with Baltimore, is in accordance with the National Transportation Policy (Juris. St. 17-19), appellees Baltimore and Ohio and Western Maryland claim that the court had no reason to consider them because competitive need for parity had not first been established (18). They go on to say that "None will argue that a transportation system adequate for national defense, as one of the objectives of the National Transportation Policy, is fostered by unlawful rate relationships."

In so arguing, appellees beg the question and fall into the same error as did the court. The Policy provides that all the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out said declaration of policy. That is what the Commission did here. It cannot be said that in making its findings under the National Transportation Policy the Commission disregarded the requirements of the other sections of the Interstate Commerce Act, as the court and appellees would infer, for, as previously noted, the Commission made requisite findings under Sections 1(5) and 3(1) of that Act. In so doing, the Commission gave consideration both to the National Transportation Policy and to other criteria. As stated in the Commission's report of October 1, 1956, 299 I. C. C. 195, at 209:

> "As stated in the prior report [291 I. C. C. 527, 554], we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its full share of the transportation burden, but it is of vital im-

portance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports. These matters, among others of record, have been given consideration in reaching our conclusions herein."

Again, it is submitted that in refusing to accept the Commission's finding that a parity of iron ore rates, Philadelphia with Baltimore, is in accordance with the National Transportation Policy, the lower court committed serious error. *Luckenbach S. S. Co.* v. *United States*, 122 F. Supp. 824, affirmed 347 U. S. 984.

CONCLUSION.

For the reasons set forth above and detailed more fully in this appellant's Jurisdictional Statement, it is respectfully submitted that the Motions to Affirm should be denied and that this Court should note probable jurisdiction and thereupon assign this case for oral argument to be implemented by briefs on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 465

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

No. 466

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the District of Maryland—Civil Action No. 9237

JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATUTES CITED

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C.:	
National Transportation Policy (Preamble to Section 1)	3, 4, 10, 11, 12, 13, 14
Section 1(5)	3, 4
Section 3(1)	3, 4
Section 15(1)	3, 4
Section 15(7)	3, 4, 10
Section 15a(2)	3, 4

IN THE

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On Appeal From the United States District Court for the District of Maryland—Civil Action No. 9237

JURISDICTIONAL STATEMENT

The Erie Railroad Company, The New York Central Railroad Company, and The Port of New York

Authority, appellants, submit this statement in compliance with Rules 13 and 15 of the Supreme Court of the United States to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of Maryland, decided April 26, 1957, is reported below at 151 F. Supp. 258, and is appended hereto as Appendix A. The court entered no findings of fact or conclusions of law apart from its opinion. The decree of the district court, entered May 22, 1957, is appended hereto as Appendix B.

The reports of the Interstate Commerce Commission are reported at 291 I.C.C. 527, 299 I.C.C. 195 and 300 I.C.C. 102.

JURISDICTION

This action was brought under 28 U.S.C. Sections 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. Section 1009, and 49 U.S.C. Section 17(9) to enjoin and set aside an order of the Interstate Commerce Commission entered on October 1, 1956. The decree of the district court which is appealed from was entered on May 22, 1957. Notices of appeal were filed in that court on July 19, 1957, by these appellants and separate notices of appeal were filed also by the Interstate Commerce Commission, United States of America, The Pennsylvania Railroad Company, City of Philadelphia, Chamber of Commerce of Greater Philadelphia, Delaware Port Authority, and by Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Corporation, Republic

Steel Corporation, Wheeling Steel Corporation, and The Youngstown Sheet and Tube Company.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Sections 1253 and 2101(b) and is sustained by a large number of cases, including the following: *New York* v. *United States*, 331 U.S. 284 (1947); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949); *King* v. *United States*, 344 U.S. 254 (1952).

STATUTES INVOLVED

The National Transportation Policy [Preamble to 49 U.S.C., sec. 1] and Sections 1(5), 3(1), 15(1), 15(7), 15a(2) of the Interstate Commerce Act, as amended [49 U.S.C. Sections 1(5), 3(1), 15(1), 15(7), 15a(2)] are set forth in full in Appendix C hereto.

QUESTIONS PRESENTED

The decree of the court below enjoins an order of the Interstate Commerce Commission entered in a proceeding instituted under Section 15(7) of the Interstate Commerce Act.

Acting under Section 15(7) of the Interstate Commerce Act, the Commission ordered the suspension of certain proposed rail rate schedules pending a hearing and determination on the lawfulness of such schedules. At the conclusion of its investigation, the Commission vacated certain portions of its suspension orders.

The district court enjoined the order of the Commission entered at the conclusion of its investigation insofar as the Commission order vacated the suspen-

sion of rates from New York, N. Y., to Youngstown, Ohio.

The following questions are presented by this appeal:

1. Whether the district court erred in setting aside an order of the Interstate Commerce Commission which found just and reasonable reductions in rates initiated by the rail carriers for application on imported iron ore from the Port of New York to the Youngstown, Ohio, area, equalizing their rates from the Port of New York with the rates of the rail carriers serving the Port of Baltimore to the same destination area, after the Commission had found, upon substantial evidence, that the proposed reduced rates (1) are compensatory, (2) are necessary to enable the carriers serving the Port of New York to compete with carriers serving the Port of Baltimore for the increasing volume of imported iron ore traffic, (3) are in accord with the National Transportation Policy, and (4) are not otherwise unlawful.

2. Whether the district court erred in its interpretation and application to this action of the provisions of the National Transportation Policy (Preamble to 49 U.S.C., sec. 1) and Sections 1(5), 15(1), 15(7) and 15a(2) of the Interstate Commerce Act (49 U.S.C., secs. 1(5), 15(1), 15(7) and 15a(2)).

3. Whether the district court erred in setting aside an order of the Commission finding just and reasonable certain carrier-initiated rates, on the theory that distance alone is the controlling factor in determining the lawfulness of rates on import traffic from the several North Atlantic ports to interior destinations.

4. Whether the district court erred in setting aside an order of the Commission finding just and reasonable a schedule of reduced rates, on the theory that the freedom of rail carriers to initiate competitive rates must yield to a long-established differential rate relationship which the court found had been voluntarily maintained by the same carriers.

5. Whether the district court, by failing to distinguish between voluntary rate action by carriers and prescription of rates by the Commission over carrier objections, erred in not recognizing that, within reasonable limits, carriers may for competitive reasons initiate, and the Commission may find just and reasonable, equalized rates on imported iron ore, in spite of differences in distance.

6. Whether the district court erred in remanding the case to the Commission to make explicit findings as to the relative costs of operation of ocean-going vessels used in transporting iron ore from various origins throughout the world to North Atlantic ports and to make explicit findings as to the volume of imported iron ore traffic to be reasonably expected in the future to move through the individual North Atlantic ports to the interior destinations (1) under a parity of railroad rates and (2) under a differential basis of rates.

STATEMENT

Prior to World War II, very little iron ore was imported into this country. Virtually all of that which was imported through the North Atlantic ports was consumed in furnaces at or near the eastern seaboard and none moved to any destinations west of Pittsburgh. The steel mills in the Wheeling, W. Va., and Steubenville and Youngstown, Ohio, areas received

their iron ore from mines in northern Minnesota, Wisconsin, and upper Michigan via the Lake Erie ports. This domestic ore has long moved on a rate structure which reflected parity of rates from all Lake Erie ports despite great differences in distance from the ports. Since World War II, however, because of the depletion of U. S. reserves of high grade ore, steel producers have been required to develop many new sources abroad, and iron ore is now being imported through the North Atlantic ports from 13 or more foreign sources.

Before October 9, 1950, the rail rate on iron ore from Baltimore to Youngstown, for example, was $3.10 per gross ton. From Philadelphia, New York, and Boston to Youngstown the rates were $3.32, $3.76, and $8.25, respectively. From the latter three ports, these were "paper rates," under which no traffic moved.

On October 9, 1950, the railroads serving Baltimore made effective reduced rates to 17 ore-consuming points in the Youngstown, Steubenville, and Wheeling areas, the rate to Youngstown becoming $2.71. As the tonnage of imported iron ore continued to increase, the railroads serving the other ports decided to publish rates which would give them a fair opportunity to compete for this new traffic which was supplanting iron ore they were moving to the same points via the Lake Erie ports. After it became apparent that only under a parity of rates would there be any fair opportunity to compete, The Pennsylvania Railroad Company (hereinafter called the "Pennsylvania") published reduced rates to become effective February 9, 1953, from Philadelphia to the 17 points, which rates were the same as those in effect from Baltimore. On the same date, the Erie Railroad Company (herein-

after called the "Erie") published an equalizing $2.71 rate from New York to 7 of the 17 points in the Youngstown area which it reaches with its own lines, and The New York Central Railroad Company (hereinafter called the "Central") published the same rate from New York and Boston to 7 points in the Youngstown area (including 5 of the 7 reached by the Erie) which the Central reaches with its own lines. Because the Baltimore carriers and the Pennsylvania refused concurrences, no parity of rates could be established to the points in the Steubenville and Wheeling areas from New York Harbor.

In an attempt to continue the monopoly on this new traffic, The Baltimore and Ohio Railroad Company almost immediately published schedules to become effective February 16, 1953, proposing to reduce its rates to those of the 17 points on its own lines by 20 cents, the proposed rate to Youngstown being $2.51. These reductions were matched by the Pennsylvania from Philadelphia by schedules filed to become effective March 11, 1953.

The operation of the proposed schedules was suspended by the Commission and after extensive hearings, Division 2 of the Commission found the equalizing $2.71 rate from Philadelphia to Youngstown just and reasonable. (291 I.C.C. 527) The Division disapproved the proposed further reductions to $2.51 in the rates from Baltimore and Philadelphia, holding that "no attempt was made to justify the reductions." A majority of Division 2 found the $2.71 rates from New York and Boston not shown to be just and reasonable. The majority stated that the proposed rates from New York and Boston would produce lower revenues than from Philadelphia; that the facilities

at New York and Boston are inadequate for unloading iron ore in substantial lots; and that there was no positive indication that adequate facilities would be constructed at these two ports (pp. 553-54).

After petitions by various parties, the matter was reopened for further hearing by the entire Commission. At the further hearing it was shown that after a parity of rates had been established from Philadelphia early in 1954 pursuant to the Division 2 report, the tonnage of imported iron ore moving from that port to destinations west of Pittsburgh in the first 11 months of 1954 totaled over 600,000 tons compared with none the previous year. At the same time, the shipments from Baltimore to this area were also increasing, going from about 800,000 tons to over a million tons.

The Port of New York Authority showed at the further hearing that there were several suitable locations for a modern ore-unloading facility at New York, but stated that it could not consider building such a facility without a parity of rates. To prove that the rate of $2.71 from New York to Youngstown is just and reasonable, the Erie introduced a complete and detailed study showing its out-of-pocket costs of hauling iron ore. The revenues from the rates exceeded such costs by about 34 percent. The Commission in its report made certain adjustments in these costs and added an amount for return on investment, which reduced the margin to about 15 percent, but even on this basis the rate is clearly compensatory and makes a substantial contribution to revenue needs.

At the further hearing, the Baltimore carriers and the Pennsylvania again made no attempt to justify

the proposed $2.51 rates, and in fact urged that the Commission disapprove such rates.

In its report (299 I.C.C. 195), the Commission found the parity of rates from Philadelphia to the Wheeling, Steubenville and Youngstown areas and the $2.71 equalizing rate from New York to the Youngstown area to be just and reasonable. The $2.71 rate from Boston was found to be noncompensatory and was disapproved. The $2.51 rates from Baltimore and Philadelphia to the Youngstown area were again found not shown to be just and reasonable and ordered canceled.

In a suit brought by the Baltimore railroads and supporting interests, the district court vacated the Commission's orders insofar as they approved the $2.71 rates from New York. The application of the rates from New York was permanently enjoined by the court.

With respect to the $2.71 rates from Philadelphia, the district court ordered the case remanded to the Commission "to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect." Pending such findings, the court ordered that parity between Philadelphia and Baltimore could be retained on the $2.71 basis, "upon the assumption that steps be taken to secure a prompt determination."

The district court affirmed the Commission's orders insofar as they disapproved further reductions to $2.51 in the rates from Baltimore and Philadelphia to Youngstown and, since no appeal was taken from that finding, those rates are not in issue here.

THE QUESTIONS ARE SUBSTANTIAL

1 and 2. The district court erred in setting aside the Commission's order approving carrier-initiated New York rates which were shown to be compensatory, competitively necessary, not otherwise unlawful, and in accord with the National Transportation Policy.

Section 15(7) of the Interstate Commerce Act provides that at any hearing involving a proposed change in a rate schedule which has been suspended for investigation by the Commission, "the burden of proof shall be upon the carrier to show that the proposed changed rate * * * is just and reasonable." In numerous proceedings involving reduced rates proposed by railroads to meet competition, the Commission has ruled that the statutory burden has been met if (1) the rates are shown to be compensatory, either by comparison with other lawful rates or through a cost study, (2) the rates are shown to be no lower than necessary to meet the competition, and (3) it does not appear that the rates are otherwise unlawful. Whenever it appears that the National Transportation Policy of developing, coordinating, and preserving an adequate national transportation system by water, highway and rail would be affected, the Commission must of course administer and enforce section 15(7), as well as the other sections of the act, with a view to carrying out that policy.

In the present case, the Commission approved the rates from New York as just and reasonable after it found that the usual criteria had been met. The Commission found that the New York rate "would exceed the costs from New York by 38.8 cents per gross ton," (299 I.C.C. 208) and that "the iron-ore tonnage through Baltimore will probably continue to increase even though rate parity is maintained at Philadelphia, and this appears to be a reasonable assumption with rate parity also at New York." (299 I.C.C. 209)

So far as the lawfulness otherwise of the New York rate is concerned, the Commission found (299 I.C.C. 208):

> "It has long been recognized that carriers may, *within lawful bounds*, so adjust their rates as to secure a fair proportion of the traffic, as well as reasonably to foster the ports which they serve. That appears to be what the respondents here have attempted to do." (Emphasis added)

In its report, the Commission specifically referred to its duty to consider the National Transportation Policy and in connection therewith found that iron ore is a commodity which is "of vital importance to the national defense" and that "it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports." (299 I.C.C. 209)

The district court's reasons for reversing the Commission's findings as to the New York rate are far from clear. Although the Commission's report left no doubt that it had approved the New York rate after finding that it met *all* of the pertinent tests, the court in various parts of its opinion states that the

Commission approved the rate *only* because it was compensatory or *only* because it was competitively necessary or *principally* because it would further the National Transportation Policy. At page 278 of its opinion, the court states:

> "* * * the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to considerations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs by 38.8 cents per ton. *For this reason alone* the rate was found to be just and reasonable;" (Emphasis added)

On the same page, the court says:

> "* * * the *only* justification in the record for the proposed rates from New York 'is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore.'" (Emphasis added)

And in an earlier part of its opinion, the court states (p. 276):

> "It is obvious that *the principal basis* for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system." (Emphasis added)

If the New York rate was approved "for the reason alone" that it was compensatory, then the fact that it

was competitively necessary could not have been "the only justification." On the other hand, if either of these was the "only" reason for the Commission's approval, then the "principal basis" could not have been that the rates would be in furtherance of the National Transportation Policy. Obviously, all three reasons formed the basis for the Commission's approval and properly so.

Actually, the district court does not seem to find fault with the Commission's findings that the equalized New York rates are compensatory, competitively necessary, and in accord with the National Transportation Policy, but seems to hold that such rates are unlawful for other reasons.

To the extent that such reasons may be inferred, they seem to be three: (a) distance alone is the controlling factor in determining the lawfulness of rates; (b) the freedom of rail carriers to initiate competitive rates must yield to a long-established differential rate relationship; and (c) the Commission's action was a prescription of rates for the purpose of diverting traffic from one locality to another. These reasons are discussed immediately below.

3. The district court erred in setting aside the Commission's order on the theory that distance alone is the controlling factor in determining the lawfulness of rates on import traffic.

In its opinion, the district court states (p. 274):

> "In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore."

The court itself points out that parity of rates for different distances "is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems." (p. 274) The court seems to hold, however, that a showing that equalized rates are compensatory, competitively necessary, and in accord with the National Transportation Policy is insufficient to justify a parity of rates for different distances.

In rate adjustments involving ports or gateways, the variations in rail distance have usually been virtually ignored. The rule that distance alone cannot govern is one of long standing. As early as 1915, the Supreme Court in *Louisville & N. R. Co.* v. *United States*, 238 U.S. 1, stated (at p. 12):

> "Water competition, rail competition, and competition of markets, enters so largely into the establishment of rates that mere distance is not necessarily a determining factor; indeed, the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road."

In its opinion, the district court states that the differential in favor of Baltimore "originated in the natural advantages derived from the shorter distance of the port to destinations in the West and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports." (p. 274) This basic misconception is probably the main reason for the court's erroneous decision. Actually, the court itself correctly states in an earlier part of its decision that the differentials were

established "so as to equalize the aggregate cost of transportation between competing points in the West and the domestic and foreign ports reached through those cities." (p. 260)

As pointed out by the Commission in *Export Grain From Buffalo to New York*, 292 I.C.C. 647, 651, the theory that each port should have the inland rate to which its geographical location might seem to entitle it has long since been rejected, since foreign traffic does not stop at the seaboard.* In port or gateway rate adjustments, distance obviously cannot be controlling and the Commission properly found in this case that there was ample justification for disregard of differences in distances by the carriers.

4. The district court erred in setting aside the Commission's order on the theory that the freedom of rail carriers to initiate competitive rates must yield to a long-established differential rate relationship under which traffic never actually moved through the competing ports.

In its opinion, the district court describes the case as follows (pp. 273-4):

> "The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the striking down of the long-established differential in favor of Baltimore in order to enable Philadelphia and

* Paradoxically, the Baltimore interests which are here contending that they should have lower rates reflecting their shorter distance to Youngstown argued in the *Grain* case that they should have a differential *under* Albany, among others, even though the short-line distance from Buffalo to Baltimore was about a third longer than to Albany.

> New York to have a share of the traffic and thereby insure their maintenance as ports of entry for the product."

Under the differential-rate adjustment, as the district court points out, the rates from Baltimore are 20 cents a ton under Philadelphia and 60 cents a ton under New York and Boston. The Commission in its report (299 I.C.C. 197) stated that the present rates from Baltimore, Philadelphia, New York, and Boston to Youngstown are $2.71, $2.71, $3.76 and $8.25, respectively. Some years ago, the rates from Philadelphia and New York were 20 and 60 cents higher than from Baltimore, but since they were "paper" rates under which no traffic moved, their level was largely immaterial. The rate on iron ore from Boston has never been related to the Baltimore rate, while on traffic subject to the differential-rate adjustment it is always 60 cents higher. In spite of these facts, the district court erroneously assumes that iron ore traffic had always moved subject to the differential-rate adjustment and reverses the Commission for its "striking down of the long-established differential."

It seems clear that even if iron ore traffic had been included in the differential-rate adjustment, there was ample justification for the Commission's approval of the carrier-proposed equalized rates from New York and Philadelphia. The district court in its opinion cites numerous proceedings in which the Commission found the differential adjustment not unlawful. (Footnote, p. 261). In all but the last of the cited proceedings the differential was attacked by commercial or port interests. In the last cited case, *Ex Parte* [*Lake*] *Grain From Buffalo to N. Y.*, 278 I.C.C. 31, the New York carriers themselves proposed to establish rate

parity instead of the differential relationships which had previously been voluntarily maintained. After the Commission disapproved the proposed rate parity, a three-judge district court at Boston reversed the Commission in *New York Central R. Co.* v. *United States*, 99 F. Supp. 394, affd. *Interstate Commerce Commission* v. *New York Central R. Co.*, 342 U.S. 890. The district court in that case explained the difference between attacks on the differential adjustment by commercial interests and a change in the adjustment proposed by the carriers, as was done in the *Grain* case (and in the instant case), as follows (p. 398):

> "In each of these proceedings the Commission held the differential to be not unlawful and refused to change it. It should be noted, however, that in all of these attacks the Commission was asked to declare the existing differential unlawful; for the first time, in the instant proceeding, has the Commission been asked to find that a change in the differential proposed by one of the competing groups of railroads would be unlawful. Heretofore, the Commission has only had to decide whether to permit the carriers to maintain the differential; here the Commission has ordered the carriers to maintain the differential or at least not to reduce it."

The district court's citation in support of its decision of a case which on appeal was decided directly opposite to the court's decision in this case only points up the court's failure to understand the exact nature of the question presented to the Commission and its action with respect thereto. The Commission in this case did not strike down anything; it merely approved carrier-initiated equalized rates from New York and Philadelphia which the proponent carriers had shown to be just and reasonable.

5. The district court erred in failing to distinguish between voluntary rate action by the carriers and the prescription of rates by the Commission.

In the opening paragraph of its opinion, the district court states (p. 260):

> "This suit was brought * * * to set aside decisions and orders of the Interstate Commerce Commission which *prescribed* parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia and New York to seventeen* destinations in the eastern portion of the so-called differential or Central Freight Association territory." (Emphasis added)

After misunderstanding the nature of the Commission's action, it was probably inevitable that the district court would reach an erroneous conclusion as to the Commission's decision. In this case, the Commission had been requested to prescribe a parity of rates by the New York and Boston carriers and to prescribe differentially related rates by the Baltimore carriers. It declined to prescribe any rates. Although these appellants believe that the Commission would have been completely justified in prescribing rate parity, that question need not be considered here. The Commission merely approved those rates which had been shown to be just and reasonable and otherwise lawful (the $2.71 rates from Philadelphia and New York) and disapproved those rates which the carriers had not justified (the $2.51 rates from Baltimore and Philadelphia) or which the Commission had found would be noncompensatory (the $2.71 rate from Boston).

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* Actually the Erie and Central rates each apply to only seven destinations.

In *New York Central R. Co.* v. *United States, supra,* the district court pointed out (p. 399):

> "The Commission itself has previously recognized, even in cases involving the ex-lake grain differential, that carriers may lawfully make voluntary rate adjustments which the Commission could not require them to make. *Galveston Commercial Association* v. *Abilene & Sou. Ry. Co.,* 109 I.C.C. 114, 121, 125 (1926); *Port of New York Authority* v. *Baltimore & Ohio Railroad Co.,* 248 I.C.C. 165, 180 (1941); *Ex-Lake Grain from Ogdensburg to New England,* 208 I.C.C. 385, 391 (1935). See also *Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.,* 126 I.C.C. 199, 211 (1927). Of course, under 49 U.S.C. § 15(7), the plaintiffs had the burden of proof before the Commission to show that the proposed rate was 'just and reasonable.' 'Conversely, the proposed schedule must be upheld as lawful unless adequate reasons are presented for finding it contrary to the statute.' *Office Supplies from Gloucester, Mass., to Chicago,* 245 I.C.C. 669, 673 (1941)."

The district court's erroneous conclusion stems largely from this failure to understand the difference between voluntary and compulsory action. So long as the carriers serving Philadelphia and New York insisted upon maintaining differentially higher rates than those from Baltimore, the Commission in numerous proceedings ruled it should not force them to establish parity and ignore the differences in distances. But where, as in the *Grain case* and the instant case, the Philadelphia and New York carriers voluntarily publish equalized rates for different distances, the Commission cannot prevent them from doing so if the equalized rates are shown to be competitively necessary and not bur-

densome to other traffic, and are otherwise not shown to be unlawful. This distinction was clearly set forth in the report of the Commission's Division 2 (291 I.C.C. 552), and the district court erred in failing to recognize it.

6. The district court erred in remanding the case to the Commission to make explicit findings* "as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelp' ia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect." (p. 278)

Such a remand seems clearly to have been beyond the court's power. By directing the Commission to make specific findings as to the traffic which has moved through the ports since February 19, 1954, the court's remand requires the Commission to reopen the case for further hearing. This, it is submitted, the district court was without authority to do.

None of the parties had petitioned for reopening of the proceeding prior to the action in the district court. If such a petition had been filed, the grant or denial thereof would have been a matter within the discretion of the Commission, and its action with respect thereto could not be reversed except upon the clearest showing

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*Although the court's remand for specific findings applies only to Philadelphia and Baltimore, it is clear that this is so only because the court's decision precludes further consideration of the New York rate altogether. Were the court's decision to be reversed with respect to New York's continuation in the case, the Commission would presumably be directed to make the same specific findings as to New York.

of abuse of discretion. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 534-545; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-518.

Only once in the history of administrative law has the Supreme Court reversed an administrative agency for refusing to grant a rehearing on the contention that the record was "stale." *Atchison, T. & S. F. R. Co.* v. *United States*, 284 U.S. 248. In that case the record was closed in September 1928 and a petition for rehearing was filed in February 1931, after there had been a tremendous change in the nation's economic conditions. There is nothing even remotely resembling such a situation here. It seems clear that if the Baltimore interests had petitioned for reopening and the Commission had refused, there would have been no grounds on which the district court could have reversed the Commission and ordered reopening. Certainly, the court cannot direct such a reopening on its own motion merely to get the latest volume figures into the record. As the Supreme Court stated in *Interstate Commerce Commission* v. *Jersey City, supra*, at p. 514:

> "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has

> been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

Even if the court had the power to remand the case to the Commission for inclusion in the record of further tonnage figures, it seems clear that such a remand would serve no useful purpose. The record is clear that no iron ore to the Youngstown area has moved or could move through Philadelphia or New York under the differential-rate basis.* The court in its opinion seems to say that rates cannot be adjusted because of the volume moving through the ports and that a port is entitled to keep all the traffic it can get. The court states (p. 277):

> "Obviously it is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to greatly increase. The port will still be entitled to the benefits of its geographical position and the expected profits of the new business may not be diverted merely to satisfy the desire of other ports to share therein."

Thus, the court says in effect that, as between Baltimore and New York, the rates must reflect geographical position and the amount of tonnage moving through the ports is immaterial. If that is so, the court cannot consistently remand the case to the Commission to make findings as to the tonnage moving through Baltimore and Philadelphia, with the idea that the relative

* So far as New York is concerned, the record shows that the construction of an ore-unloading facility which is necessary to permit the movement of iron ore in volume will not even be undertaken without a parity of rates.

volume moving through those two ports will determine the proper rate adjustment.

The Commission found that carriers serving the competing ports would have a fair opportunity to compete for this traffic on the basis of equal rates. In its report, the Commission set forth all the tonnage figures which were submitted prior to the closing of the record and on the basis of such figures made all of the predictions for the future which it could reasonably be expected to make.

The Court's remand for the purpose of specific findings as to the relative costs of ocean shipping is equally erroneous. The evidence before the Commission was clearly insufficient for it to make such findings. The only estimate as to the daily operating cost of a large ore carrier was a "guess" by a Boston witness. The court in one part of its opinion refers to the cost as "$2,000 per day" (p. 265) and in another part as "from $1,000 to $2,000 per day." (p. 277) If the Baltimore carriers wanted to claim that they were under a competitive disadvantage because of the lower ocean costs to competing ports, it was incumbent upon them to submit evidence to show the amount of this disadvantage. This, they did not do. Instead, they based their claim for a rail-rate advantage upon the old differential-rate adjustment which they argued must be applied to this traffic.

Even if, pursuant to the court's directions, the Commission should reopen the proceeding and require some qualified party to submit evidence as to ocean costs, such evidence would be of little use. As pointed out in the Commission's report (299 I.C.C. 198), while Philadelphia and New York have an ocean distance ad-

vantage (although not necessarily an ocean-cost advantage) over Baltimore with respect to some foreign origins, the reverse is true as to other foreign origins. These rates apply not just on Labrador ore, as the court seems to imply, but on all iron ore, whatever its source. Although most of the ore presently coming through Philadelphia and Baltimore to the Youngstown area originates in Labrador, there is nothing to prevent the steel companies from moving the ore from other foreign origins to the Youngstown area.

Even with rate parity, the New York carriers would have a fair opportunity to compete for only a small fraction of the ore coming from Labrador. The M. A. Hanna Company, which controls 27 percent of the total Labrador iron ore production, also controls the company which operates the ore-unloading facility at Philadelphia and it is unrealistic to expect that much of this ore would move through New York. Another 38 percent of the Labrador ore production is controlled by steel companies whose plants are located at points not reached by the New York lines and to which no equalized rates have been published. Some of the plants of the Republic Steel Corporation, which controls 25 percent of the Labrador ore production, are not reached by the New York lines and where this company has "split cargoes" going to several destinations, New York almost certainly would not be used. It is only with respect to the 10 percent of Labrador iron ore controlled by the Youngstown Sheet and Tube Company that the New York carriers would have any real opportunity to compete. If the New York carriers are to get any sizable volume of imported iron ore traffic it will probably have to come not from Labrador but from countries where New York is at an ocean distance disadvantage.

Thus, it is clear that the district court was without authority to remand the case to the Commission and direct that it be reopened for further hearing and additional specific findings. Even if the court had such power, the additional findings requested would be of little or no value and would not justify the remand.

CONCLUSION

The questions presented by this appeal are substantial and they are of considerable public importance. It is respectfully submitted that probable jurisdiction should be noted.

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APPENDIX A

Filed 26 April, 1957.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Plaintiffs,*

v.

THE UNITED STATES OF AMERICA, ET AL., *Defendants.*

(Argued January 21 and 22, 1957. Decided 26 April, 1957.)

Before SOPER, Circuit Judge, CHESNUT and R. DORSEY WATKINS, District Judges.

Edwin H. Burgess (William C. Purnell, Jervis Langdon Jr., Anthony P. Donadio, John S. Stanley, Charles J. Henry Jr., on brief), for plaintiffs.

Harry C. Ames, Washington, D.C. (Thomas N. Biddison, F. Clifford Hane, attorneys for Mayor and City Council of Baltimore, on brief), for Baltimore Association of Commerce and other Baltimore Commercial Interests, plaintiffs.

J. Crossan Cooper Jr. (Francis D. Murnaghan Jr., on brief), for Canton Railroad Company, plaintiff.

William L. Marbury (Donald Macleay, Washington, D.C. and Franklin G. Allen, Baltimore, Md., on brief), for Maryland Port Authority, plaintiff.

John H. D. Wigger, Attorney, Department of Justice (Victor R. Hansen, Assistant Attorney General; Walter E. Black Jr., United States Attorney; James E. Kilday, Attorney, Department of Justice; Robert W. Ginnane, General Counsel and I. K. Hay, Assistant General Counsel, Interstate Commerce Commission, on brief), for defendants.

John F. Donelan, Washington, D.C. (Dickson R. Loos, Washington, D.C., Wendell D. Allen, Baltimore, Md., on brief), for Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Corporation (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, and the Youngstown Sheet and Tube Company, intervenors.

Henry E. Foley, Boston, Mass. (Herbert M. Brune, Baltimore, Md. and Clarence I. Peterson, Boston, Mass., on brief), for Port of Boston Commission, intervening defendant.

William Q. Keenan, New Haven, Conn. (Herbert M. Brune, Baltimore, Md. and Robert Bleakney, Boston, Mass., on brief), for the New York, New Haven & Hartford R.R. Co. and for the Boston & Maine R.R. Co., defendants.

Richard M. Murphy, Chicago, Ill. and Samuel H. Moerman, Washington, D.C. (M. C. Smith Jr., Cleveland, Ohio; Robert D. Brooks, New York, N. Y.; Sidney Goldstein, New York, N. Y.; Francis A. Mulhern, Wilbur La Roe Jr., Arthur L. Winn Jr., J. Stanley Payne, Walter J. Myskowski, all of Washington, D.C.; Nicholas G. Penniman III, Baltimore, Md., on brief), for the Erie Railroad Company, defendant; the New York Central Railroad Company and the Port of New York Authority, intervening defendants.

Guernsey Orcutt, Philadelphia, Pa. (Richard R. Bongartz, Philadelphia, Pa.; William Pepper Constable and George W. Constable, Baltimore, Md., on brief), for The Pennsylvania Railroad Company and C. W. Boin, Agent, defendants.

David E. Pinsky, Assistant City Solicitor (David Berger, City Solicitor, on brief), for the City of Philadelphia, intervening defendant.

(George M. Radcliffe, Baltimore, Md. and Frederick H. Knight, Philadelphia, Pa., on brief for Chamber of Commerce of Greater Philadelphia, intervening defendant.)

Warren Price Jr., Washington, D.C. (George M. Radcliffe, Baltimore, Md.; Morris Duane, Philadelphia, Pa.; Bruce A. Wallace, Camden, N.J., on brief), for the Delaware River Port Authority, intervening defendant.

Soper, Circuit Judge:

This suit was brought by the Baltimore and Ohio Railroad Company, Western Maryland Railway Company, Canton Railroad Company and certain civic authorities and commercial organizations of Baltimore, Maryland, to set aside decisions and orders of the Interstate Commerce Commission which prescribed parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia and New York to seventeen destinations in the eastern portion of the so-called differential or Central Freight Association territory. This area lies west of a line from Buffalo, New York to Pittsburgh, Pennsylvania and includes Youngstown, Ohio on the north, Wheeling, West Virginia on the south and other intervening steel

producing points in western Pennsylvania, eastern Ohio and northern West Virginia.[1] The defendants, in addition to the United States and the Interstate Commerce Commission, include as original or intervening defendants the Pennsylvania Railroad Company which serves the port of Baltimore as well as the ports of Philadelphia and New York, the New York Central Railroad Company and the Erie Railroad Company which serve the port of New York, the Port of New York Authority, the New York, New Haven and Hartford Railroad Company and the Boston and Maine Railroad Company which serve the Port of Boston, the Port of Boston Commission and divers producers and fabricators of steel in the differential territory.

The decisions of the Commission which are challenged in this proceeding mark the departure from a long established practice which has kept the rates applicable to both import and export traffic to and from differential territory lower as to Baltimore than the other Atlantic ports. The differentials were first established in 1877 by agreement of the carriers serving the territory in order to avoid misunderstandings in respect to the geographical advantages of Baltimore, Philadelphia and New York, as affected by rail-and-ocean transportation, so as to equalize the aggregate cost of transportation between competing points in the west and the domestic and foreign ports reached through those cities. The differentials were arbitrary in a measure since they reflected only in part the lesser distances to Baltimore and Philadelphia as compared with the distances to New York and Boston, but

[1] Differential territory is defined in *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691, 692. The seventeen points, all consuming or storage centers for iron ore, are Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowellville, Niles, Struthers, Warren, and Youngstown, Ohio; Benwood, E. Steubenville, Follansbee, Weirton and Wheeling, W. Va.

they were established by compromise as the only means of averting rate wars.[2] The differentials applied to all traffic eastbound and westbound, domestic and export-import, between Central territory and the north Atlantic ports. The differential on eastbound export traffic from the differential territory was 60 cents per ton less to Baltimore and 40 cents per ton less to Philadelphia than the corresponding rates to New York. On westbound import traffic the same differential applied to third or fourth class and special commodity rates. Rates to Boston were not to be less than those to New York on domestic or foreign freight. In 1880 an attempt was made to modify the agreement on the ground that changes had substantially equalized ocean freights but after arbitration by the Thurman Advisory Commission the differentials established in 1877 were reaffirmed.

While this arrangement originated in a voluntary agreement of the carriers it has been considered by the Commission from time to time during the past 60 years when it was brought to the Commission's attention by commercial interests in Boston, New York, Philadelphia and Baltimore, and in each instance has been found lawful.[3]

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[2] See *Maritime Asso., Boston Chamber of Commerce* v. *A.A. R.R. Co.*, 95 I.C.C. 539, 567; 126 I.C.C. 199.

[3] For a resume of the history of the differential, see *In the Matter of Differential Rates*, 11 I.C.C. 12 (1905); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151 (1936). It was also considered under varying circumstances in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C.C. 612 (1898); *In the Matter of Relative Rates upon Export and Domestic Traffic in Grain and Grain Products*, 8 I.C.C. 214 (1899); *Chamber of Commerce of N.Y.* v. *N.Y.C. & H.R. R.R. Co.*, 214 I.C.C. 155 (1912); *In the Matter of Import Rates*, 24 I.C.C. 78 (1912); *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691 (1929); *Lighterage Cases*, 203 I.C.C. 481 (1934); *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938); *State of New Jersey* v. *Baltimore & O. R. Co.*, 24 I.C.C. 581 (1941); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I.C.C. 165 (1941); *Ex Parte Grain from Buffalo to N.Y.*, 278 I.C.C. 31 (1950).

Prior to 1930 the differential was applicable to both domestic and import-export traffic. In that year the Commission removed all domestic class rates from the scope of the differential rate structure and prescribed new scales of class rates from the several ports, based primarily on distance.[4] Under this new arrangement, the longer distances from the three other ports resulted in a differential on domestic traffic to and from Baltimore, which exceeded the long established differential in its favor on import and export traffic. The domestic first-class rates to Youngstown from Baltimore were fixed at $2.01 per hundred pounds, from Philadelphia $2.16 per hundred pounds, from New York $2.31 per hundred pounds, and from Boston $2.70 per hundred pounds. Since these rates did not cover import and export traffic the railroads in 1932 published new import and export class rates. These were made the same as the new domestic rates so far as Baltimore was concerned and the standard differentials in favor of Baltimore of 20 cents a ton with respect to Philadelphia and 60 cents a ton with respect to New York and Boston were preserved. The import-export class rates from the three cities last mentioned thus became generally lower than their domestic rates.

For some reason, that is not explained, the rates on iron ore from Philadelphia to Pittsburgh have been the same as those from Baltimore to Pittsburgh since 1903. This parity, however, prior to the present controversy, has been only a paper equalization, since there has been practically no movement from Philadelphia to Pittsburgh and no attempt has been made by the Baltimore railroads to set up a differential on this traffic.[5]

[4] *Eastern Case Rates Investigation*, 164 I.C.C. 314.

[5] In the seven years from 1946 to 1952 inclusive, 2,160,000 gross tons moved from Baltimore to the steel mills in Pittsburgh, and 652,500 tons from Baltimore to Johnstown. No tonnage moved

In 1949, in response to complaints from steel producers in the interior calling attention to the increased volume of movement and other changed conditions, the carriers undertook a study of the rate structure and as a result the Baltimore and Ohio, the Western Maryland, the Pennsylvania and connecting lines established, as of October 9, 1950, reduced rates on iron ore from Baltimore to Pittsburgh and also to steel mills in differential territory to the west. The Pennsylvania made a like reduction on iron ore from Philadelphia to Johnstown and Pittsburgh. The new rates retained the regular port differential to destinations in differential territory and parity between Baltimore and Philadelphia on traffic moving to Johnstown and Pittsburgh. No action was taken at this time to establish revised rates on iron ore moving from ports other than Baltimore to differential territory, but the record of the conference of railroads shows that "it was understood the usual port differentials should be observed from the other north Atlantic ports."

In August 1951, the Pennsylvania, anticipating an increase in the volume of imported iron ore and conscious that it could not expect to share in the transportation of the commodity from Philadelphia to the interior without adequate unloading facilities at this port, announced that it would erect a modern unloading facility at Greenwich in South Philadelphia designed to cost not less than $10,000,000. It proceeded to erect such facility and had spent the greater part of this sum before publishing reduced rates on iron ore, effective February 9, 1953, to which reference will now be made. Unloading facilities were installed in Baltimore by the Canton Railroad in 1917.

It was against this background that the Interstate Commerce Commission, in the decisions now under review,

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from Philadelphia to Pittsburgh and only 8333 tons, comprising one cargo, to Johnstown. During the six years from 1946 to 1953 inclusive, approximately 647,000 tons moved from Baltimore to the steel mills in the Youngstown area and none from Philadelphia.

gave its approval to parity of rates on iron ore moving from New York, Philadelphia and Baltimore to Central territory, but denied parity to Boston. The case grew out of the publication by the Pennsylvania of reduced rates on iron ore, effective February 9, 1953, from Philadelphia to the seventeen points in differential territory, and the simultaneous publication of like rates by the New York Central from the ports of New York and Boston, and by the Erie Railroad from New York to destinations in the Youngstown area on their lines. The effect of these publications was to reduce the rates on iron ore from Philadelphia, New York and Boston to Youngstown to $2.71 per gross ton, the same rate which applied to Baltimore.[6] In order to meet this reduction and to preserve at least in part the historic differential, the Baltimore and Ohio and the Western Maryland then published, to be effective February 16, 1953, a reduced rate of $2.51 per ton on iron ore from Baltimore to those of the seventeen points on their lines, thus restoring a 20-cent differential in favor of Baltimore as compared with the other three ports. No attempt was made by the Baltimore railroads to restore the standard differential of 60 cents over New York and Boston.

The Baltimore and Ohio and the Western Maryland also published a reduction of 20 cents per ton, effective February 16, 1953, to Pittsburgh, Johnstown, Donora, and Monessen in order to establish a differential on shipments of ore to Pittsburgh in accordance with the general port differential structure and to preserve a proper rate relationship between Pitsburgh and the other named cities. The Pennsylvania countered with a rate reduction of 20 cents per ton, effective February 16, 1953, from Philadelphia and Baltimore to the four named cities, and a further reduction of 20 cents in its rates from Philadelphia

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[6] The rates are stated without the general increase approved in Ex-Parte No. 175.

and Baltimore to the seventeen points in differential territory, effective March 11, 1953.

The Baltimore and Ohio, the Western Maryland and divers Baltimore interests protested the rate reductions by the other railroads and all of the above-mentioned reductions were suspended by the Commission pending an investigation instituted on February 6, 1953. This was followed by a hearing and oral argument, and an order of Division 2 of the Commission on February 5, 1954, which approved the reduction originally published by the Pennsylvania, effective February 9, 1953, giving Philadelphia a parity with Baltimore, but cancelled the tariffs of the New York Central and the Erie equalizing rates from New York and Boston with Baltimore. Division 2 also found that the February 16, 1953 tariffs of the Baltimore and Ohio and the Western Maryland, and the March 11, 1953 tariffs of the Pennsylvania were not just and reasonable and ordered them to be cancelled. The Pennsylvania then published a supplementary tariff making the equalization of rates effective February 19, 1954, whereupon the Baltimore interests filed suit in this court asking a restraining order pending reconsideration by the entire Commission. The court refused to issue the order on the ground that the administrative process had not been completed, with the result that parity rates from Philadelphia went into effect and have since prevailed. The full Commission, on July 30, 1954, stayed its order cancelling the rates from Baltimore, New York and Boston and reopened the proceeding. Finally, on October 1, 1956, the Commission rendered its decision, finding that the February 9, 1953 rates from Philadelphia and New York were justified but that the February 16, 1950 rates from Baltimore, the March 11, 1950 rates from Philadelphia, and the February 9, 1953 rates from Boston were not justified and ordered them cancelled. In this proceeding we are concerned with the propriety of the Commission's

action as to the rates from Baltimore, Philadelphia and New York.[7]

The modification of rates on iron ore by the railroads which serve the Atlantic ports in competition with Baltimore was brought about by important changes in business conditions involving an increased demand for steel and an increase in the importations of iron ore which theretofore had contributed little to the total volume of commodities transported by the railroads from the coast to the interior. The origins of the ore that has been and will be imported through the Atlantic ports have an important bearing on the controversy. No figures are available for the years 1955, 1956 or 1957 since the record before the Commission was closed on December 21, 1954, and the case is submitted to this court on the Commission's record. An outline of the conditions prevailing prior to and after World War II and until the Commission's record was closed is set out in the following excerpt from the report of Division 2 of the Commission:

"Mines in northern Minnesota, Wisconsin, and upper Michigan have for many years been the sole or principal source of supply for the iron-ore requirements of steel mills in central and trunkline territories, the preponderance of the ore moving by rail to Lake Superior docks, thence by water to lower Lake Erie ports, and by rail beyond. Prior to the end of World War II in 1945, importation of iron ore was comparatively light and the preponderance of the ore imported was consumed in furnaces at or near the eastern seaboard. Some imported ore moved to steel mills in the Johnstown and Pittsburgh, Pa., areas but little, if any, moved to mills west thereof. A few shipments which moved to interior points were consigned to manufacturers of paint or other commodities not produced by the steel mills.

"Since the end of World War II, steel producers have developed sources of supply for iron ore in Venezuela,

[7] By a subsequent decision filed on March 19, 1957, the Commission reaffirmed its decision as to the Boston rate.

Chile, Liberia, Brazil, Sweden, and Cuba, and this basic raw material of the steel industry has been imported in large volume. Mines now being developed in Labrador by the Iron Ore Company of Canada will supply large quantities of iron ore for the furnaces of five steel mills in central territory which own stock in that corporation, and to other consumers. During the 6-year period from 1936 through 1941 from approximately 2,000,000 to 2,500,000 tons of iron ore were imported annually. The import movement declined drastically during World War II, reaching a minimum of 402,096 tons in 1943, most of which originated in Canada. Following the war, importation of iron ore increased from 1,189,300 tons in 1945 to 10,145,415 tons in 1951, the latter figure equivalent to over 4 times the prewar tonnage. In 1952, a strike occurred in the steel industry and approximately 9,760,300 tons of iron ore were imported during that year. It is estimated that within a few years 20,000,000 tons of iron ore will be imported annually, a substantial portion of which will move to furnaces in central territory. While ex-lake ore will continue to move from the Lake Erie ports in large volume, it will be replaced by imported ore to a greater extent than in the past."

The full Commission, in its report of October 1, 1956, commented upon the increase in importations of iron ore into the United States in the following excerpt from its decision:

"Iron ore imported into the United States in 1948 originated in 28 foreign countries and aggregated 6,091,677 gross tons. By 1953 the tonnage had increased to 11,074,035 gross tons. The principal exporting countries in this period were Chile, Sweden, Venezuela, Brazil, Liberia, and Peru. On and between August 26 and October 6, 1954, a total of 1,511,875 gross tons of ore were shipped from 13 foreign ports to north Atlantic ports. Of this amount, 776,851 tons (51 percent) entered the Port of Baltimore, 718,809 tons (48 percent) entered the Port of Philadelphia, and 16,215 tons (1 percent) entered the Port of Boston. There was no reported entry of ore at New York during this period. Approximately one-third of this ore originated at Seven Islands, Labrador, from which no tonnage moved prior to 1954."

Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953 and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus, in the eight months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation. The facilities at Sparrows Point have a capacity of 6,000,000 tons and those at Fairless have a capacity of 2,000,000 tons annually. None of the ore delivered to Sparrows Point moves to differential territory. We are concerned primarily with the importations of iron ore that are delivered to the railroads for transportation to interior points subject to the published rates.

Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation. From July 31, 1954, when these shipments began, to December of that year, 1,375,747 tons were unloaded at Baltimore and Philadelphia; and it seems certain that this was merely a beginning for, as the Commission said in its final report, the evidence leaves no doubt that "Labrador tonnage will increase to 10,000,000 tons in 1956 and probably to a greater extent in later years." In short, importations from Labrador may be expected to constitute at least one-half of all the ore imported. The proportion of this business which will come to Baltimore and Philadelphia, respectively, is foreshadowed, although imperfectly, by what happened in the last six months of 1954. In that period 744,017 tons came to Baltimore and

631,730 tons to Philadelphia. The Philadelphia tonnage would have been greater and the Baltimore tonnage less by 113,210 tons but for a strike which caused a diversion to Baltimore to tonnage consigned to Philadelphia.

The effect of the abolition of the differential between Philadelphia and Baltimore, which became effective on February 19, 1954, is shown to some extent by comparison of deliveries of foreign ore from all sources to railroad piers at the two ports in 1953 and 1954. In the first year Baltimore received 1,813,512 tons of which 808,875 were delivered to the railroads for shipment to the differential territory, while Philadelphia received 1,113,917 tons of which 687,994 tons were delivered to the railroads to be delivered, 20,561 tons to Pittsburgh and 667,433 tons to points east of Pittsburgh—none of it going to the differential territory. In 1954, Baltimore received 1,644,294 tons and of this 1,070,457 tons went to destinations west of Pittsburgh; while in this year Philadelphia received 1,564,844 tons of which 681,599 tons went to the differential territory.

The future movement of foreign ore to this country, especially ore from Labrador, is the all-important circumstance in this case. The Labrador deposits are owned by the Iron Ore Company of Canada, of which 27% is owned by the M. A. Hanna Coal and Ore Company and the balance by five steel producers[8] owning plants west of Pittsburgh, including twelve or thirteen plants in differential territory. These corporations are entitled to share in the product in proportion to their interests. The steel producers in differential territory will use their shares and the balance will be sold, for the most part, to the Bethlehem Steel Corporation. All of the ore is shipped from Seven Islands, Quebec. While some of it will move by routes not involved in this proceedings, five or six

[8] National Steel Co., Republic Steel Corp., Armco Steel Corp., Youngstown Sheet and Tube Co., Wheeling Steel Corp.

million tons will move annually through Atlantic ports to inland furnaces. The ore will be carried in ships owned or chartered by the Iron Ore Company of Canada or the participating companies; and the record shows that, in order to save transportation costs by sea, the ore will be delivered, in case of parity of railroad rates, to the nearest port equipped with efficient unloading facilities. The Commission found that the one-way ocean distances from Seven Islands to the four Atlantic Coasts to be: Boston, 950 miles; New York, 1187 miles; Philadelphia, 1320 miles, and Baltimore, 1475 miles. If the Chesapeake and Delaware Canal were used the excess distance to Baltimore over Philadelphia would be 26 miles, but the Commission found that the larger ore vessels cannot use the canal at present and probably would not use it if the canal were deepened. The evidence shows that a 20,000 ton ore carrier with a speed of 14 knots requires three days less steaming time on a round trip basis from Seven Islands to Boston, two days less to New York and twenty-one hours less to Philadelphia than to Baltimore; and that it costs $2,000 per day to operate such a ship. Abolition of the differential of 20 cents per ton in favor of Baltimore and the establishment of parity of railroad rates between Philadelphia and Baltimore would cause shippers to route Labrador ore destined for differential territory through the Port of Philadelphia.

Since the Commission's decision of October 1, 1956 took no account of any shipments subsequent to December 1954, the effect of the parity of rates between Philadelphia and Baltimore in the intervening period was not ascertained, although it might have been done before the decision was rendered. The record, however, throws some light, as we have seen, on the shipments in the limited period between February 19, 1954, when the Pennsylvania put the parity rates into effect, and December 1954. The evidence directed to this period, although necessarily meager, tends to confirm the opinion of experienced wit-

nesses heard by the Commission, that under parity rates Labrador ore destined for differential territory will move through Philadelphia and not through Baltimore. The experience of the Canton Railroad emphasizes this conclusion. This is a shipping road with 37 miles of track in the Port of Baltimore, connecting with the Baltimore and Ohio and the Pennsylvania by rail and the Western Maryland by float. It constructed the first unloading facilities in Baltimore in 1917, in which it has invested $5,000,000 in reliance upon the differential. It is largely dependent upon the importations of ore. In 1952, its tonnage of imported ore comprised 55% of its total of which 39% was iron ore; and in 1953, the corresponding percentages were 66% and 28%, respectively. In the first nine months of 1953, it received 499,000 tons of iron ore but in the same period in 1954 under parity this amount had diminished to 239,000 tons, a decrease of 52%.

A similar situation exists with regard to the much smaller amount of ore which is brought to this country from the Port of Monrovia in Liberia. This ore is controlled by the Republic Steel Corporation, which has furnaces in differential territory and carries the ore in its own ships. In 1952, 420,000 tons were imported and it was estimated that in 1953 the amount would be somewhat larger. Heretofore all or nearly all of this ore was delivered at the Port of Baltimore. The ocean distances (miles) from Liberia to the Atlantic ports are as follows: Boston, 3920; New York, 3973; Philadelphia, 4074, and Baltimore, 4194.

The iron ore brought in from South America and Scandinavia has little bearing on the question at issue. The Commission found that, in the first nine months of 1954, 94% of the ore which originated in Venezuela, Chile, Peru and Sweden was consigned to the United States Steel Corporation and the Bethlehem Steel Corporation. Bethlehem received about 6,000,000 tons, none of which

moves to differential territory. It is estimated that United States Steel will receive about 7,000,000 tons annually, of which 2,000,000 tons will enter the United States through the Gulf ports and 2,000,000 tons more will be consumed at Fairless. There will be a substantial movement from the docks owned by the corporation at Fairless by rail to Pittsburgh. Facilities at Fairless permit the blending of the iron before shipment to Pittsburgh and this service will be improved, and when this is done the United States Steel Corporation will abandon its practice of importing through Baltimore the iron ore for use at Pittsburgh. The corporation is not interested in the rate from Baltimore but desires a lower rate from Fairless to Pittsburgh. Baltimore has an advantage as to distances over the other ports with respect to shipments of ore from South America, except Brazil, but a disadvantage with respect to the shipments from Scandinavia.

Adequate unloading facilities are essential to the delivery of iron ore at a point of entry. Canton Railroad, as we have seen, was the first to establish such a facility in Baltimore in 1917. The Western Maryland followed in 1930, and its facility with subsequent improvements can now handle three ships at a time. The Baltimore and Ohio pier was built in 1950 and 1951 and cost $5,000,000. The capacity of these three piers in Baltimore is 13,500,000 tons per year, based on a 15% use of specially designed ore carrier type ships, and if the use of such ships is raised to 65% the total capacity will be increased to 22,275,000 tons per year. These facilities were constructed while the differential was in effect.

In March 1954, the Pennsylvania completed the first stage of its unloading facility at a cost of $11,000,000. The capacity is from 3,000,000 to 6,000,000 tons of ore, depending on the type of ship. An enlargement, which would have increased the capacity of the facility by 50%, was ordered in 1954 and scheduled to be finished in 1955. The

Pennsylvania contemplates an ultimate expansion which would enable it to treble its original capacity. It estimated that it needed 2,500,000 additional tons of ore per year to maintain its Philadelphia pier profitably. These facilities were established while there was parity of rates between Baltimore and Philadelphia on traffic moving to Pittsburgh.

Bethlehem at Sparrows Point and the United States Steel at Fairless each has its own unloading facility. The first has been in operation since 1946 and the latter since January 1953.

New York and Boston have no modern ore unloading facilities and only a very small tonnage of iron ore passes through these ports. Without parity of rates with Philadelphia and Baltimore no facility is planned at either location.

The relation of the rates to the distances for which iron ore is transported from the Atlantic ports to the differential territory is a factor necessary to be considered in this case since § 3 of the statute forbids a carrier to give any undue or unreasonable preference to any port or locality, or to subject any port or locality to any undue or unreasonable prejudice. The short line distances of the railroads from the several ports to Youngstown, Ohio, that is, the shortest physical routes over which traffic may be moved without transfer of lading, although through rates and routes may not be published, are as follows:

To Youngstown, Ohio

From	Short Line Distance miles	Difference in Distance Over Baltimore miles
Baltimore	378	..
Philadelphia	424	46
Morrisville	437	59
New York	490	112
Boston	646	268

The short tariff route distances between these points, that is to say, the shortest routes from each port over which rates on iron ore are actually published, are as follows:

To Youngstown, Ohio

From	Short Tariff Route miles	Excess over the Shortest Tariff Route from Baltimore (W. Md.→ 381 Miles)
Philadelphia:		
P.R.R.	428	47
Morrisville:		
P.R.R.	441	60
New York:		
Erie	569	188
N.Y.C.	612	231
Boston:		
N.Y.C.	670	289
B&M	661	280
NY., NH., & H.	692	311

For reasons of convenience, the Pennsylvania moves iron ore traffic over longer and more circuitous routes from both Philadelphia and Baltimore to Youngstown. The route which it uses from Philadelphia (434 miles) is practically the same as its short tariff route therefrom (428 miles); but instead of using its short tariff route of 404 miles from Baltimore, it carries the shipments 423 miles through Perryville, Maryland. If its actual operating route from Philadelphia is compared with its actual operating route from Baltimore, the difference in distance is only 11 miles; but if this operating route from Philadelphia is compared with the short operating route from Baltimore—

that of the Western Maryland Railroad—Philadelphia's excess distance is 53 miles.

The decisions of the Commission are set forth in the report of Division 2 on February 5, 1954, 291 I.C.C. 527, and the report of the full Commission on October 1, 1956, 299 I.C.C. 195. The latter dealt principally with additional evidence adduced in the interval and seems to have adopted the report of Division 2 except that it approved the new schedules from New York to the Youngstown area which Division 2 had rejected. The reports recite in considerable detail the history of the differential, hereinbefore set out, and the contentions of the opposing sides[9]; and the findings

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[9] The Commission notes the contentions of the Pennsylvania that parity between Baltimore and Philadelphia is necessary so as not to stifle the importation of iron ore through Philadelphia and so as to enable the steel producers to make proper use of the new facilities at Philadelphia; that the differential was never intended to apply to low-grade bulk material and hence parity did not constitute a departure from the former practice; that Baltimore did not object to parity with Philadelphia on traffic moving to the Pittsburgh area for 50 years and that all imported iron ore moves through Pittsburgh; that the commercial interests of Baltimore will not be injured since parity as far as the Pittsburgh area has not disrupted the general port differential adjustment and the great increase in imports of iron ore will provide ample tonnage for Baltimore's unloading facilities. On the other hand, the Commission takes cognizance of the contentions that interests serving the port of Baltimore are entitled to reap the natural advantages flowing from its location; that parity would deprive Baltimore of these advantages and place the entire port differential rate structure in jeopardy by giving rise to demands for reduced rates on other imported bulk commodities; that the earnings on tonnage carried from Baltimore was substantially greater than tonnage carried from Philadelphia to the differential territory because of the shorter distances from the former port; that parity of rates on iron ore from Baltimore and Philadelphia to Pittsburgh during the past 50 years should be disregarded because there was no movement from Philadelphia to Pittsburgh under this schedule.

of the Commission, which are sometimes mingled with the statement of the contentions of the parties, and the ultimate conclusions of the Commission are then set forth. They may be summarized as follows:

It is shown by a statement filed by the Pennsylvania in support of its claim to parity, which the Commission seems to have found correct, that parity of rates on iron ore applies both from Baltimore and Philadelphia to Steeltown, Pennsylvania, a steel producing point east of Pittsburgh; also from Baltimore and Philadelphia to Buffalo, although the route from Baltimore over the Baltimore and Ohio is 190 miles and that over the Western Maryland is 165 miles longer than the route from Philadelphia over the Pennsylvania. A similar comparison is made between routes from Baltimore and routes from Norfolk to steel mills in Ohio and Michigan as to which parity prevails, although the distances from Norfolk are from 25 to 192 miles longer than the distances from Baltimore. Likewise parity of rates but disparity of distances exist in rates from Lake Erie ports to steel mills in the Youngstown and Wheeling areas, as to which reference is made to the decision of the Commission in *Iron Ore Rate Cases*, 41 I.C.C. 181, in which the Commission pointed out that blast furnaces must be operated continuously and that it is of advantage to the steel producers and also to the operators of the vessels to have more than one port available. It was also shown that there is a movement of large quantities of eastbound ore from Erie and Buffalo to the steel mills at Bethlehem, Fairless, Philadelphia and Sparrows Point under a parity rate of $2.71—notwithstanding the inequality of distances; and it was said that the earnings under the proposed rates from Philadelphia to steel mills in the Youngstown area compare favorably with the earnings under the $2.71 rate from Erie and Buffalo to eastern furnaces.

In both reports the Commission seems to have approved the contention of the Pennsylvania that there are only 11

miles difference between the transportation routes from Philadelphia and Baltimore to the differential territory and, therefore, the services from both ports are substantially identical. In its final report the Commission said:

> "The Pennsylvania urges also that rates from Philadelphia the same as those from Baltimore are justified by mileage and service factors. The average tariff-route distances over the Pennsylvania to the 17 destinations in differential territory are 422 miles from Philadelphia and 398 miles from Baltimore. Based on these distances, the equalized rates yield average ton-mile revenues of 6.4 mills from Philadelphia and 6.7 mills from Baltimore. The actual operating route of the Pennsylvania from Philadelphia is only 11 miles greater than its actual operating route from Baltimore. In both instances, the movement is via Pittsburgh, and approximately 75 percent of either haul is over the same tracks. Thus, the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore."

This statement seems to say that, in considering difference of distance between Baltimore and Philadelphia, the comparison should be made between the Pennsylvania's direct route from Philadelphia and its unnecessarily long route from Baltimore via Perryville, rather than between the tariff route of the Pennsylvania from Baltimore and the corresponding routes of the Baltimore railroads from Baltimore.

Division 2 of the Commission had little to say about the movement of the Labrador deposits because they had not begun to move prior to February 5, 1954, when the report was filed. The Commission merely quoted an owner of stock in the Iron Ore Company of Canada as saying that five or six million tons of ore will be available for shipment in 1955 and that 10,000,000 tons are likely to be shipped in

1956. It is also pointed out that vessels of eighteen to twenty-eight thousand tons capacity will be used in transporting the ore to the north Atlantic ports; that a large number of railroad cars will be required; that economic necessity will require the movement to take the route from Seven Islands to the mills entailing the lowest transportation costs; and that alternate ports at equal rates are required in order to avoid congestion and to give the steel mills the opportunity to select the port to be used.

In the Commission's report, reference is made to its opinion *In the Matter of Rate Differentials*, 11 I.C.C. 13, which considered the Baltimore differential in 1905. The Commission said that that that time ocean rates favored the northerly ports but now iron ore moves in both chartered vessels and vessels owned by steel companies, and since 1920 ocean rates generally have been equalized with respect to voyage charters to the north Atlantic ports, but in some circumstances there is a saving of cost in routing the ore to the port nearest point of origin and that this might be true on a time charter arrangement or for an integrated shipper. The Commission then pointed out the approximate ocean distances from various points of origin to the Atlantic ports and also set out the figures which showed the amounts of Labrador ore received at Baltimore and at Philadelphia in the period from July 31 to December 5, 1954. The Commission, however, made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore. The Commission's figures as to the tonnage received at these two ports is limited to the period from July 31 to December 5, 1954, and no evidence was offered or considered as to the shipments during the year 1955 and 1956 preceding the date of the Commission's decision. The Commission did not pass on the testimony heretofore referred to in his opinion indicating that Labrador ore would seek the port offering the lowest cost of transportation from

the point of origin to the destination in steel producing territory.

The Commission did not undertake to appraise the relative weight of the various factors entering in its decision, but Division 2 stated the following general conclusions with respect to the proposed rates from Philadelphia, New York and Boston:

> "The evidence in support of the proposed adjustment from Philadelphia is substantially stronger than that offered in behalf of the proposed rates from New York and Boston. We are convinced that, in view of the earnings that would be yielded by the suspended rates from Philadelphia, such rates are not below a minimum reasonable level. We are of the view further that establishment of the proposed rates from Philadelphia will not result in disrupting the existing port relationship on traffic generally to destinations in differential territory. As indicated, the rates on iron ore from Baltimore and Philadelphia to the Pittsburgh area have been on a parity for over 50 years without disturbing the port relationship on the other commodities, and no good reason appears why the extension of this parity to ore-consuming points beyond Pittsburgh should change this situation. The record is persuasive that the iron ore tonnage through Baltimore will probably continue to increase regardless of the movement through Philadelphia.
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> "Moreover, in administering the provisions of the act the Commission is required to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. The evidence is certain that in the years to come a large proportion of the iron ore used in this country will

originate in foreign countries. This iron ore is and will be an important factor in national defense. Especially in case of national emergency, it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port which could be incapacitated through congestion or other cause, and that, in the interest of national defense, Philadelphia and Baltimore be placed on a rate parity on imported iron ore as proposed in the schedules filed to become effective on February 19, 1953. Such a parity would not result in undue preference or prejudice."

Division 2 reached the ultimate conclusion that the proposed rates from Philadelphia to the differential territory were just and reasonable but that the rates from New York and Boston were not shown to be just and reasonable.

The general conclusions of the full Commission reaffirmed Division 2 with respect to rates from Philadelphia. They found that a substantial increase in iron ore imports would continue in that Labrador tonnage would increase to 10,000,000 tons in 1956 and to a greater extent in later years, and that the tonnage through Baltimore would probably continue to increase notwithstanding the maintenance of a parity rate with Philadelphia and also with New York. The Commission also reaffirmed the conclusions of Division 2 with respect to the necessity for parity in carrying out the national transportation policy. In this respect it said:

"As stated in the prior report, we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its

full share of the transportation burden, but it is of vital importance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports. These matters, among others of record, have been given consideration in reaching our conclusions herein."

New York and Boston rates:

The railroads serving New York and Boston pointed out the importance of being allowed to share in the new traffic based upon the importation of iron ore so as to replace the large revenues now received from domestic iron ore moving eastward from the Minnesota-Michigan ranges. The railroads also stressed the fact that business interests could not be expected to invest capital in constructing unloading facilities at New York or Boston unless parity of rates was established with Baltimore and Philadelphia, enabling the more northerly ports to share in the business; and they also emphasized the importance of having one or more ports available to handle the new importations.

Division 2 of the Commission, however, pointed out the greater distances from New York and Boston to the differential territory and resulting in the smaller earnings at those ports under parity of rates. It said:

"... From New York and Boston to the 7 destinations in the Youngstown area, the short-line distances average 487 and 642 miles, respectively, whereas to the same destinations the short-line distances average 424 miles from Philadelphia and 380 miles from Baltimore. The average short-line distance from Philadelphia exceeds that from Baltimore by only 11.6 percent whereas the like distances from New York and Boston are greater by 28 and 70 percent, respectively, than the distance from Baltimore.

"The proposed rates from Philadelphia compare favorably with rates applicable on iron ore from and to points in central and trunkline territories and thus come within the 'zone of reasonableness' to which reference is made in *New York Central R. Co.* v. *United States, supra.* The proposed rates from New York and Boston would produce substantially lower revenues from those from Philadelphia. Moreover, the record shows that the facilities at New York and Boston are not adequate for the unloading of iron ore in substantial lots, and there is no positive indication that adequate facilities would be constructed thereat or that any substantial movement through those ports under the proposed rates could be expected. We conclude that, in the circumstances, the proponents of the proposed rates from New York and Boston have not sustained the statutory burden placed upon them to prove that these rates are just and reasonable."

Subsequent to the decision of Division 2 additional testimony was taken in which witnesses for the Boston and Maine and the New York, New Haven and Hartford indicated that unloading facilities would be established at Boston if equal rates with Baltimore were permitted, and similar representations as to the establishment of facilities at New York were made by persons interested in the development of that port. It was however made clear by all of the witnesses that facilities would not be established without assurances of parity of rates.

The Commission then made a comparison of revenues from the four north Atlantic ports to destinations in the Youngstown area. In one computation, using short-line distances, the following tabulation was made of the car-mile and ton-mile revenues on an average load of 62 gross tons and the rate from Baltimore of $3.035, which included the Ex-Parte No. 175 increase, i.e., a general increase applied by the Commission to all the rates:

From	Short-Line Distances miles	Car-Mile cents	Ton-Mile mills
Baltimore	378	49.8	8.0
Philadelphia	424	44.4	7.2
New York	490	38.4	6.2
Boston	646	29.1	4.7

The Commission then considered certain cost studies submitted by the Erie Railroad for the single line haul from New York to Youngstown and for the joint haul with other railroads from Boston, and stated the final conclusion:

> "We have carefully considered all of the evidence pertaining to the estimated out-of-pocket cost from New York and Boston. After restating the costs on the bases indicated, including the distribution of the costs of freight-train repairs, depreciation, and rentals of other than mileage cars over freight-train car-miles, loaded and empty, and the application of the unit cost to the loaded and empty car-miles of the imported ore traffic, we conclude that $2.647 and $3.42 would more nearly approximate the out-of-pocket costs per gross ton from New York and Boston, respectively. On these bases, the rate of $3.035 would exceed the cost from New York by 38.8 cents per gross ton, but would be 38.5 cents less than the costs from Boston."

On this basis the Commission found that the Baltimore rate would be just and reasonable as applied to New York, but would not be just and reasonable as applied to Boston.

The Commission also found that the $2.51 rate from Baltimore to Youngstown proposed by the Baltimore railroads as of February 16, 1953, would not be just and reasonable despite the fact that a comparison of the car-mile and ton-mile revenues via short line distances under the $2.71 rate (without the Ex-Parte No. 175 increase) from

New York to Youngstown, with similar revenues under the $2.51 rate from Baltimore, shows that the latter would exceed the former. The comparison is shown by the following table:

To Youngstown, Ohio

From	Rate	Car-Mile cents	Ton-Mile mills
Baltimore	$2.51	41.2	6.6
New York	2.71	34.3	5.5

In general, the Commission concluded that the natural advantages to which the Port of Baltimore would ordinarily be entitled were outweighed by the need to maintain ports of entry for iron ore at Philadelphia and New York and that this should be accomplished by diverting traffic from Baltimore to the other ports to such an extent that the facilities already established at Philadelphia may be more extensively and profitably used, and so that New York would be encouraged to build facilities which it does not now possess.

The weight to be given to the administrative findings of the Commission and the scope of the authority of the reviewing court are well established. The expert judgment of the Commission in respect to matters in the field committed to it by Congress must be recognized and its conclusions, if supported by substantial evidence on the whole record, must be accepted. The Court is not at liberty to substitute its judgment for that of the Commission. As was said in *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission

are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I.C.C.*, 206 U.S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Commission is not required to make detailed findings of fact but must make the basis of its decision clear so that the reviewing court may perform its function. The matter was well stated by Judge Magruder in *New York Cent. R. Co. v. United States*, 99 F.Supp. 394, 400, affirmed, 342 U.S. 890:

"In Beaumont, S. L. & W. Ry. Co. v. United States, 1930, 282 U.S. 74, 86-87, 51 S.Ct. 1, 75 L.Ed. 221, the Supreme Court, while upholding a Commission order, took occasion to criticize the Commission for the unnecessary burden cast upon the reviewing court by failure of the Commission to include in its report a complete statement showing the grounds upon which its determinations rested. Just how far the Commission is obliged by statute to go in this particular is not so clear as it might be. The Commission does have the duty to set forth in its report the 'basic' or 'essential' or 'quasi-jurisdictional' findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree. United States v. Chicago, M., St. P. & Pac. Railroad Co., 1935, 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023; United States v. Baltimore & Ohio Railroad Co., 1935, 293 U.S. 454, 463, 55 S.Ct. 268, 79 L.Ed. 587; Florida v. United States, 1931, 282 U.S. 194, 215, 51 S.Ct. 119, 75 L.Ed. 291."

See also *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 504-5; *Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 211-2; and *Secretary of Agriculture v. United States*, 347 U.S. 645, 653, where the failure of the Commission to explain adequately its departure from prior norms led to a remand of the case for more explicit findings.

The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the striking down of the long established differential in favor of Baltimore in order to enable Philadelphia and New York to have a share of the traffic and thereby insure their maintenance as ports of entry for the product.

The Commission in reaching its conclusions must of course give effect and adhere to the national transportation policy declared by Congress, which provides for the promotion of sound economic conditions among the several carriers and the establishment of reasonable charges for transportation services without unjust discrimination, undue preferences or advantages and without unfair or destructive competitive practices, to the end that a national transportation system may be built up, adequate to meet the needs of the commerce of the United States and of the Postal Service and of the national defense. See Preamble to 49 U.S.C. §§ 1, 301, 901 and 1101. However, in effecting this policy it is made unlawful for any carrier to give any undue or unreasonable preference to any person, locality or port, or to subject any person, locality or port to undue or unreasonable prejudice or disadvantage. 49 U.S.C. § 3 (1). The statute also provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carrier, proposing the rate to show that it is just and reasonable. 49 U.S.C. § 15.

In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its conclusions and whether there was substantial evidence to support the findings. In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore. This ruling, moreover, has upset a railroad and Commission practice of many years duration in which the factor of distance was given effect. Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *New York* v. *United States*, 331 U.S. 284, 305; *United States* v. *Illinois Central*, 263 U.S. 515, 524.

What are the findings upon which the Commission relies as the basis for its conclusion that there should be parity of rates between the ports notwithstanding the factor of distance? As to Philadelphia and Baltimore they seem to be:

1. That there is parity in respect of rates between Baltimore and Philadelphia as to other routes which involve differences in distance;

2. That in any event the difference in distance to the differential territory, measured from Philadelphia and Baltimore, is so insignificant that it should be disregarded, and

3. That the needs of the producers of steel and the requirements of the Postal Service and of the national defense make essential the maintenance of a plurality of ports for the importation of iron ore into the United States.

The propriety and sufficiency of these findings must be appraised against the historic background in which the differential in favor of Baltimore has been maintained. Undoubtedly it originated in the natural advantages derived from the shorter distance of the port to destinations in the west and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports not only by practical railroad men but by impartial governmental authority in control. This practical solution of the difficulties arising from competition was based on solid legal ground, for it is settled that the law does not attempt to equalize opportunities among localities and that the natural advantage which belongs to a locality does not constitute a preference. *United States* v. *Illinois Cent. RR. Co.*, 263 U.S. 515, 524; *New York* v. *United States*, 331 U.S. 284, 331-2; *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216, 229. The Commission itself is without authority to adjust rates and differentials for the purpose of diverting traffic from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another. *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 639.

This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may not reduce its rates to meet competition within the zone of reasonableness, but differences in rates based upon differences in length of haul, density of traffic and other elements of the cost of service are within a long standing practice of rate making, and a rate may not be filed for the purpose of diverting traffic from one locality in order to build up another. *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 636, 639. Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *New York* v. *United States*, 331 U.S. 284, 297, 298. The Commission in reaching its conclusion must consider all of these factors and may not condemn a

ifference in rates "unless it is shown not to be justified y the cost of the respective services, by their values, or y other transportation conditions." *United States* v. *llinois Cent. R.R. Co.*, 263 U.S. 515, 524.

In passing upon the merits of the case, the Commis-ion gave no consideration to the cost or value of the ervices of the railroads competing for traffic at Phila-lelphia and Baltimore. No evidence on these points was ffered or required; but the ultimate finding of the Com-nission as to distances from Philadelphia and Baltimore o Central territory was that the difference is so insignifi-ant that the service from both ports is substantially iden-ical. Evidence to support this finding seems to us to be acking. Not only does the disparity, which had been con-sidered substantial for many years, still exist, but the only standard of measurement proffered by the Commission for its finding was obviously incorrect. The Commission de-clared that the actual operating route from Philadelphia to Central territory is only 11 miles greater than the operating route from Baltimore. This seems convincing until it appears, from a careful reading of the decision, that the Commission is comparing the distance via the Pennsylvania from Baltimore with the distance via the Pennsylvania from Philadelphia and that in doing so it measures the distance from Philadelphia over a direct route, but measures the distance from Baltimore over a circuitous line through Perryville, which the railroad com-pany adopts for its own convenience. Clearly the treat-ment was wrong. The comparison should be made on the same basis in each instance, for example, between the short line distances or between the short tariff distances from both ports, which shows a difference of 47 miles in the one case and 24 miles in the other. It is fair to say that the Commission, contrary to its former policy, either gave no weight whatever to the factor of distance or found that it was overborne by the general policy of sup-plying the needs of national commerce and the require-ments of national defense.

We do not overlook the existence of parity of rates despite disparity of distances in respect to other commodities over other routes to which the Commission referred in its decision, seemingly as precedent for its present action. There was nothing new in this situation. These other rates had long existed but in spite of them the differential in favor of Baltimore on traffic moving to the Central territory had been maintained and carriers serving the port in reliance upon it had adjusted their rates and provided and maintained adequate facilities. We think that these other rates furnish no reasonable basis for change of view on the part of the Commission.

It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system. How far the Commission's authority extends in this direction is an interesting and important question. The respondents stress the passage of the Act of September 18, 1940, 54 Stat. 899, whereby the Act to regulate commerce was amended to include the introductory declaration of the national transportation policy. This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the enforcement of all the provisions of the statute.[10] No one suggests, however, that the Commission has general authority to build up the transportation system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute

[10] *Luckenbach S.S. Co.* v. *United States*, 122 F.Supp. 824, affirmed, 347 U.S. 984; *Atlanta & St. Andrew's Bay Ruy. Co.* v. *United States*, 104 F.Supp. 193; *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 576; *Pacific Inland Tariff Bureau* v. *United States*, 129 F.Supp. 472.

which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

For our purposes it is enough to determine whether there is substantial evidence to support the finding that a radical change in the rates was needed to support the national policy. In the first place, it is to be noted that there is no evidence of financial weakness on the part of the railroads involved as has led the Commission in some cases to fix rates in aid of the financial necessities of certain carriers. See *New England Divisions* case, 261 U.S. 184. The decision of the Commission is based on the general conclusion that the northerly ports will have no share in the transportation of imported iron ore so long as the differential exists because ocean freights have been generally equalized since 1920 and the ore will inevitably be shipped to the port which enjoys the cheapest railroad rate to the interior.

Definite findings are made as to the ocean distances from major sources of iron ore to the north Atlantic ports, which show the distances from Labrador to be 950 miles to Boston, 1187 miles to New York, 1320 miles to Philadelphia and 1470 miles to Baltimore; and it is said that a round trip between Labrador and Baltimore requires about three more days than a round trip between Labrador and Boston. The Commission, however, does not attempt to review the considerable body of testimony bearing on the relative costs of ocean travel to the several destinations. A witness is quoted as saying that at the present time iron ore from foreign ports moves both in vessels owned by the steel companies and in chartered vessels; that charter agreements may be voyage charters or time charters; that the ocean rates of voyage charters

are equalized to all North American ports; but that in some instances there is a cost saving in routing ore to the nearest port "on a time charter or for an integrated shipped."

These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore. There was direct testimony that water costs bear a direct relationship to the time spent in transit; that the investments in large ore carrying vessels are substantial and operating costs are high, ranging from $1000 to $2000 per day; that the shipipng season from Labrador is short and that time consumed in making round trips is an important element in moving the maximum tonnage to the destination; that vessels under a time charter and vessels owned by the steel companies would be routed to the nearest port, all other factors being equal; and that the ownership of vessels by the steel companies is expanding. The weight of all this testimony tends strongly to support the view that ocean costs will be an influential if not a determining factor in selecting the ports of destinations, which basis is lacking for the general conclusion of the Commission that without parity of rates Philadelphia will have no share in the traffic. On the contrary, shipments during a few months in 1954, the only period considered, indicate that under parity the ore will go to Philadelphia rather than to Baltimore, since Philadelphia enjoys the double advantage of smaller ocean costs and the most modern unloading facilities.

In the absence of specific findings, it does not seem reasonable to destroy a long established differential on the strength of which the railroads serving Baltimore have made large investments and the commercial interests of the port have made their arrangements. Obviously it is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to

greatly increase. The port will still be entitled to the benefits of its geographical position and the expected profits of the new business may not be diverted merely to satisfy the desire of other ports to share therein.

We think, however, that the record furnishes a reasonable basis for the decision of the Commission to retain parity of rates between Baltimore and Philadelphia in respect to traffic to Pittsburgh. Similar reasons for the maintenance of the status quo apply as in the case of Baltimore. It is true that, so far as iron ore is concerned, only a paper rate was involved until recently; nevertheless, parity has existed for more than 50 years with the acquiescence of Baltimore, and it was retained without objection in the revision of rates in 1950 when the rate of imported iron ore from Philadelphia to the Pittsburgh area was reduced by the same amount as the rate from Baltimore. While there has been no significant movement of iron ore from Philadelphia to the steel mills in the Pittsburgh area during this period, there was, as the report of Division 2 of the Commission shows, a substantial movement from Baltimore to this district. The Pennsylvania Railroad announced its intention, in August 1951, to erect a modern unloading facility in South Philadelphia with the obvious purpose to share in this traffic and in its expected increase, but no objection to the existing parity of rates came from the Baltimore railroads until they made their tactical move in 1953 in order to preserve the consistency of their position.[11] In our

[11] The respondent railroads contend that parity as to Pittsburgh is inconsistent with the differential as to the Central territory, pointing out that Youngstown, one of the points in that territory, is 66 miles distant from Pittsburgh over the Pennsylvania Railroad as compared to 76 miles over the Baltimore and Ohio. This incongruity, however, does not present a new element for it has existed throughout the history of the differential and, in any event, we are concerned not with the comparative distances from Pittsburgh but with comparative distances from the ports of Philadelphia and Baltimore.

opinion, it is of great significance that Philadelphia interests have made a large capital investment in providing unloading facilities in the belief that the historic situation would be retained; and it would be unreasonable at this time to deny them the opportunity to make use of the structure which they have set up.

The lack of substantial basis for the allowance of parity to the Port of New York is shown by what has already been said; but it may be added that the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to considerations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs by 38.8 cents per ton. For this reason alone the rate was found to be just and reasonable; and yet in the same opinion, the Commission found that the rate of $2.51 from Baltimore, proposed by the Baltimore railroads to take effect February 16, 1953, that is to say, 20 cents under the current rate, would not be just and reasonable, although the evidence shows that the return thereon would exceed the return on the New York rate which the Commission approved. As the four dissenting commissioners point out, the only justification in the record for the proposed rates from New York "is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore."

We conclude (1) that the orders of the Commission should be affirmed insofar as they disapprove the schedules filed to become effective on February 16, 1953, proposing reduced rates from Baltimore to the Pittsburgh and Central areas, and the schedules filed to become effective on February 16, 1953, and March 11, 1953 from Philadelphia to the Pittsburgh and Central areas, respec-

tively; and (2) that the orders be vacated insofar as they approved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined; and (3) that, insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect; and (4) that, pending said findings and a decision based thereon, parity between the ports of Philadelphia and Baltimore be retained upon the assumption that steps be taken to secure a prompt determination.

The orders of the Commission are modified and the case is remanded to the Commission for further proceedings consistent with this opinion.

We concur in this opinion:

W. Calvin Chesnut
United States District Judge.

R. Dorsey Watkins
United States District Judge.

APPENDIX B

In the District Court of the United States for the District of Maryland

---

CIVIL ACTION No. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, CANTON RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY, BALTIMORE ASSOCIATION OF COMMERCE, THE BALTIMORE CHAMBER OF COMMERCE, THE STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC., BALTIMORE CUSTOM HOUSE BROKERS AND FORWARDERS ASSOCIATION, THE MAYOR AND CITY COUNCIL OF BALTIMORE, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE PENNSYLVANIA RAILROAD COMPANY, AND C. W. BOIN, AGENT, AND THE NEW YORK CENTRAL RAILROAD COMPANY AND ERIE RAILROAD COMPANY, DEFENDANTS

(Filed 22d May 1957)

Decree

This 22d day of May 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed: to wit, it is:

ORDERED, ADJUDGED, AND DECREED

1. That the order of the Interstate Commerce Commission dated October 1, 1956, is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorizes the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956, enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956, insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953, is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the Opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953, be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953, and March 11, 1953.

(S) MORRIS A. SOPER,
United States Circuit Judge.

(S) W. CALVIN CHESNUT,
United States District Judge.

(S) R. DORSEY WATKINS,
United States District Judge.

APPENDIX C

The National Transportation Policy (Preamble to 49 U.S.C. 1) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * *

Sec. 1. * * * (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * *

Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or

any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * *

Sec. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the

maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * * * *

Sec. 15. * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders wthout answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in the case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require

the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decisions of such questions preference over all other questions pending before it and decide the same as speedily as possible.

* * *

Sec. 15a. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

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IN THE

Supreme Court of the United States

October Term, 1957.

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Et Al., *Appellees,*
No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Et Al., *Appellees,*
No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

APPELLANTS' MOTION AND BRIEF TO RECALL AND CLARIFY THE JUDGMENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957.

RIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants,*

vs.

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No. 465

HE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant,*

vs.

HE BALTIMORE AND OHIO RAILROAD COMPANY, Et Al., *Appellees,*

No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT.

Appellants, Erie Railroad Company, The New York Central Railroad Company and The Port of New York Authority, move to recall this Court's judgment issued to the United States District Court for the District of Maryland on January 9, 1958, for the reason that the District Court has interpreted said judgment and this Court's order of December 9, 1957, to authorize the issuance by the District Court of an injunction against making effective reduced rates on iron ore from New York to the Youngstown area on a level with those applicable from Philadelphia and Baltimore, pending reconsideration and final decision by the Interstate Commerce Commission pursuant to the remand of the District Court, whereas appellants

say that said judgment and order should be interprete
so as to prohibit any such action by the District Cour
Appellants respectfully request that said judgment of thi
Court be recalled and clarified accordingly.

Respectfully submitted,

SAMUEL H. MOERMAN
RICHARD J. MURPHY
Attorneys for Appellants

BRIEF IN SUPPORT OF MOTION TO RECALL AND CLARIFY THE JUDGMENT.

STATEMENT.

In February, 1953 the rail carriers serving the ports of Philadelphia and New York published reduced rates from those ports on imported iron ore to the Youngstown area, equalizing their rates with those applying from Baltimore to the same area. After suspension and investigation, Division 2 of the Interstate Commerce Commission, in a report dated February 5, 1954, found the rates from Philadelphia lawful but by a 2-to-1 vote disapproved the rates from New York. The Philadelphia carrier published a supplementary schedule making the equalizing rates effective February 19, 1954, whereupon the Baltimore interests filed suit in the Maryland District Court asking a restraining order pending reconsideration by the entire Commission. That court refused to issue the order on the ground that the administrative process had not been completed, with the result that the equalizing rates from Philadelphia went into effect and have since prevailed. On reconsideration the entire Commission not only affirmed the Division's decision as to the lawfulness of the Philadelphia rates but also approved the New York rates. Upon the filing of a suit by the Baltimore interests to set aside the Commission's order, the Maryland District Court issued a temporary restraining order against the New York rates. After hearing, the District Court issued its decree, appended hereto as Appendix A, ordering the Commission's order to be vacated insofar as it approved the New York rates and permanently enjoining such schedules from being made effective. Upon appeal, this Court's order, appended hereto as Appendix B, vacated "so much of the decree of the District Court as did not affirm the order of the Commission" and remanded the cause "for appropriate disposition not inconsistent with" its opinion.

Upon remand, the District Court issued a new "Decree," appended hereto as Appendix C, providing in part as follows:

> 5. That pending reconsideration and final decision by the Commission pursuant to the remand, the tariff schedules on iron ore from New York filed to become effective February 9, 1953 shall not be made effective or permitted to become effective.

Thus, although the District Court correctly declined to enjoin the Philadelphia rates before completion of the administrative process, it now refuses to do the same with respect to the New York rates, even though the Commission had found the New York rates lawful and this Court ordered vacated "so much of the decree of the District Court as did not affirm the order of the Commission." More than 5 years after the New York rail carriers originally published equalizing rates to the Youngstown area they are still unable to make such rates effective and to share in the tremendous volume of import iron ore which their Philadelphia and Baltimore competitors have been monopolizing for the past 4 years. Unless this Court recalls and clarifies its judgment as requested, the New York rail carriers will be effectively blocked from participating in this traffic for several more years, even though there is now little or no doubt that their proposed reduced rates will ultimately be found lawful.

It is submitted that the issuance of a new injunction by the District Court is (1) contrary to the plain meaning of the order and judgment of this Court and (2) outside the jurisdiction of the District Court in the present circumstances.

The relief sought by this motion has been granted in other cases, *Cahill* v. *New York, N.H. & H.R. Co.*, 351 U.S. 183; *Palermo* v. *Luckenbach S.S. Co.*, 355 U.S. 910, decided January 6, 1958.

ARGUMENT.

I.

ISSUANCE OF AN INJUNCTION AGAINST THE NEW YORK RATES IS CONTRARY TO THE PLAIN MEANING OF THE ORDER AND JUDGMENT OF THIS COURT.

In its opinion and order issued in this case, 355 U.S. 175, on December 9, 1957, this Court ordered that:

> "... on the appeals before us, so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and the cause is remanded for appropriate disposition not inconsistent with this opinion."

It is clear then that the above order required the District Court to vacate its decree of May 22, 1957, except insofar as it had affirmed a portion of the Commission's order. The original decree of the District Court had vacated the Commission's order insofar as it had approved the New York rates and expressly enjoined their effectiveness. Since this Court's order provided that "so much of the decree of the District Court as did not affirm the order of the Commission is vacated", the injunction against the New York rates, as one part of the District Court's decree of May 22, 1957 which "did not affirm" the Commission's order, should have been vacated. That part of the decree which enjoined the New York rates clearly did not "affirm" the Commission's order and it is not susceptible to such an interpretation by any mode of construction. Since, as is apparent from the original District Court decree set forth in Appendix A, *infra*, P. 1a, the injunction was an integral part of the "decree of the District Court" and one which "did not affirm the order of the Commission", it "is vacated" and it should be so indicated by this Court.

Thus, since the meaning of this Court's order was clear, it was incumbent upon the District Court "not to alter it or give any further or other relief" not directed by the order such as imposing an injunction against the rates which are now before the Commission on reconsideration. See *Thornton* v. *Carter*, (8th Circ., 1940) 109 F.2d 316.

II.

BY NECESSARY IMPLICATION THE ORDER OF THIS COURT HAS PRECLUDED THE DISTRICT COURT FROM ENJOINING RATE SCHEDULES WHICH WERE ORDERED REMANDED TO THE COMMISSION FOR FURTHER CONSIDERATION.

The construction of this Court's order contended for by appellants is the only construction consistent with the jurisdiction of the Federal District Court. The Federal District Courts of the United States can constitutionally exercise only such jurisdiction as may be granted to them by Congressional enactment. *Kentucky* v. *Powers*, 201 U.S. 1 (1906). Thus there is no inherent power in the federal judiciary to enjoin the publication, filing or effectiveness of rates.

Prior to the passage of the Interstate Commerce Act no jurisdiction existed with respect to that subject because Congress had not exercised its right to so regulate rates. *Columbus Iron & Steel* v. *Kanawha & M. Ry. Co.*, (S.D. W.Va., 1909) 171 F. 713. At the present time the Federal Courts have the power to enjoin rates but they may exercise this statutory power only as ancillary relief where the Court has jurisdiction over an order[1] of the Interstate Commerce Commission which concerns the rates enjoined

[1] 28 U.S.C. § 1336
"Interstate Commerce Commission's Orders. Except as otherwise provided by Act of Congress, the District Courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

and in which the Court finds the Commission order to be invalid. There is, therefore, no jurisdiction in the Federal Courts to enjoin the publication or effectiveness of a rate apart from the jurisdiction to enjoin a Commission order. *Houston Coal & Coke Co.* v. *Norfolk & W. Ry.*, (W.D. Va., 1909) 171 F. 723.

In the course of its opinion, this Court summarized the previous proceedings before the District Court as follows:

> "... an appropriate District Court held that the Commission's approval of parity between New York and Baltimore was without basis in the record and ordered that portion of the Commission's order vacated. The Court further held that the Commission's approval of parity between Philadelphia and Baltimore was not supported by essential findings as to ocean freight costs and remanded that portion of the Commission's order for more explicit findings. *The Court also granted other relief subsidiary to these actions.*" (Emphasis supplied)

Clearly this Court considered the action of the District Court in ordering vacation of that part of Commission's order which approved the rates from New York as the *principal relief* granted and considered the injunction against the tariffs naming rates from New York as only subsidiary or *ancillary relief* necessary to implement the principal relief. But now this case has been remanded to the Commission for a new order. The order of this Court terminated this litigation and withdrew the Commission order, which was the basis for the District Court's jurisdiction, from the further consideration of that Court. Any further judicial action concerning a Commission order with respect to the involved rates would have to be invoked by a new action, which of course can not be brought until the Commission enters a further order in regard to these rates. *National Bus. Traffic Ass'n.* v. *U.S.*, (D. N.J., 1954) 122 F. Supp. 876, 878. Since by this Court's order the proceeding

was returned to the jurisdiction of the Commission, there is no longer any "order" before the District Court to which an injunction of the involved rates can be ancillary. Moreover, the District Court has not by its order reserved any jurisdiction over the subject matter, i.e., the Commission order. It is evident then that such an injunction was an assumption by the District Court of the bare power to suspend rates while they are before the Commission for its administrative determination of their reasonableness.

But such an injunction cannot be issued by a District Court. The power to suspend the effectiveness of rates prior to the final order of the Commission is one which has been entrusted exclusively to the Commission by Section 15(7) of the Interstate Commerce Act which is set forth in Appendix D, *infra*, P. 12a. The controlling rule of law that the Federal Courts have no power to enjoin rates independently of an injunction against an Interstate Commerce Commission order is a corollary of the fundamental principle that the fixing of rates for the future is an administrative function of a legislative nature. *Arizona Grocery Co.* v. *Atchison, Topeka, & Santa Fe Railroad Co.*, 284 U.S. 370 (1932); *Great Northern Ry. Co.* v. *Kalispell Lumber Co.*, (9th Circ., 1908) 165 F. 25. A determination by a Court, acting prior to the Commission's finding of the facts as directed by the remand, that the rates should be enjoined would be the farthest thing from the traditionally limited judicial power to test the legality of final Commission orders.

The law is to the contrary. The power to suspend rates prior to the entry of the final administrative decision is one exclusively entrusted to the Commission. In *Board* v. *Great Northern Ry.*, 281 U.S. 412 (1930), Chief Justice Hughes stated that, "This power of suspension was entrusted to the Commission only." In *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, (S.D. G.A., 1916) 236 Fed. 573, aff'd 239

Fed. 718, in concluding that the Commission's power to suspend rates is exclusive, the Court held that this statutory power of the Commission ousts the United States Courts of their general equity jurisdiction of that particular subject. To the same effect are *Director General* v. *Viscose Co.*, 254 U.S. 498 (1921) and *Algoma Coal and Coke Co.* v. *U. S.*, (E.D. Va., 1935) 11 F. Supp. 487. Since the Commission has not as yet completed its consideration of these rates and has yet to enter its final order pertaining to them, the District Court lacked jurisdiction to enjoin these rates. *Carlsen* v. *U.S.*, (S.D. N.Y., 1952) 107 F. Supp. 398.

Again, the well settled rule is that the Federal Courts have not the power to interfere by injunction while a matter committed to the jurisdiction and control of an administrative agency is pending before that agency. *Procter & Gamble* v. *Coe*, (D.C. Cir., 1938) 96 F.2d 518, cert. den. 305 U.S. 604. The considerations which have given rise to the doctrine of "primary jurisdiction" can never be more compelling than they are in this case. For, inasmuch as this Court had ordered that the *reasonableness* of these rates must be reconsidered by the Commission in the light of the interrelationship between the three ports it is an *a fortiori* proposition that the case at this stage presented at least an ambiguous case with respect to the *lawfulness* of the New York rates. It was, therefore, incumbent upon the District Court to stay its hand after this Court had decided that the validity of these rates was still an open question and that the answer to that question must be provided by the Commission in the first instance.

The regulatory scheme as created by Congress is such that the carriers have the right to initiate rates which become effective by their own force unless the Commission in its exclusive discretion chooses to suspend them pending its final determination of their reasonableness. *United States*

v. *Chicago, M., St.P. & P. R. Co.*, 294 U.S. 499. Moreover, Section 15(7) specifically provides that if the proceeding has not been concluded within the suspension period the proposed rate "shall go into effect at the end of such period." Thus if there can be said to have been a degree of ambiguity present in the opinion and order of this Court there can be no doubt that the doctrine of "primary jurisdiction" and the Constitutional inhibitions on the jurisdiction of federal district courts dictate that the order be interpreted as necessarily implying that there be no injunction against any of the rates which were remanded to the Commission for further consideration.

CONCLUSION.

For the foregoing reasons, appellants respectfully pray that their motion be granted.

Dated: Chicago, Illinois
April 30, 1958

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APPENDIX.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.

CIVIL ACTION NO. 9237.

The Baltimore and Ohio Railroad Company, Canton Railroad Company, Western Maryland Railway Company, Baltimore Association of Commerce, The Baltimore Chamber of Commerce, The Steamship Trade Association of Baltimore, Inc., Baltimore Custom House Brokers and Forwarders Association, The Mayor and City Council of Baltimore, Plaintiffs.

vs.

United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company, and C. W. Boin, Agent, and The New York Central Railroad Company and Erie Railroad Company, Defendants.

* * * *

(FILED 22D MAY 1957)

* * * *

DECREE.

This 22d day of May, 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed: to wit, it is:

ORDERED, ADJUDGED AND DECREED.

1. That the order of the Interstate Commerce Commission dated October 1, 1956, is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorizes the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956, enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956, insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953, is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the Opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953, be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956, is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953, and March 11, 1953.

/s/ MORRIS A. SOPER,
United States Circuit Judge.

/s/ W. CALVIN CHESNUT,
United States District Judge.

/s/ R. DORSEY WATKINS,
United States District Judge.

APPENDIX B.

ORDER.

Per Curiam.

This litigation involves the validity of an order of the Interstate Commerce Commission dealing with the proper relationship, under the National Transportation Policy (§1 of the Transportation Act of 1940, 54 Stat. 899, 49 U.S.C., at p. 7107), of railroad tariffs on imported iron ore shipped to a steel-producing area in Pennsylvania, Ohio and West Virginia (the so-called "differential territory" of the Central Freight Association) from the ports of New York, Philadelphia and Baltimore. A tariff differential in favor of Baltimore had existed prior to this controversy. In a succession of tariff reductions, railroads serving New York and Philadelphia filed schedules designed to establish parity of rates among the several ports, while railroads serving Baltimore filed schedules designed to maintain the differential. Upon protest against the New York and Philadelphia schedules by Baltimore civic and commercial interests and railroads serving that port, the Interstate Commerce Commission instituted an investigation as a result of which Division 2 of the Commission filed a report approving the tariff schedules giving Philadelphia parity with Baltimore but finding all other schedules that had been issued in this series of reductions to be not just and reasonable. 291 I.C.C. 527. On petition of various parties, the Commission reopened the proceedings, and on October 1, 1956, the full Commission modified the findings of the Division 2 report to the extent of finding the New York schedules, as well as the Philadelphia schedules, to be just and reasonable, 299 I.C.C. 195. The full Commission's order was challenged in a proceeding instituted under 28 U.S.C. §1336, and an appropriate District Court held that the Commission's approval of parity between New York and Baltimore was

without basis in the record and ordered that portion of the Commission's order vacated. The court further held that the Commission's approval of parity between Philadelphia and Baltimore was not supported by essential findings as to ocean freight costs and anticipated traffic and remanded that portion of the Commission's order for more explicit findings. The court also granted other relief subsidiary to these actions. 151 F. Supp. 258. These are the only portions of the decision below with which we are here concerned. We put to one side those provisions of the decree below in which the District Court affirmed other portions of the Commission's order.

From what appears, it is not precluded that the Commission may find an interrelationship, within the purview of the National Transportation Policy, *supra*, among lawful tariffs to be established between these three ports and the "differential territory." In this light we deem it appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, the Commission should be free to reconsider and take action upon the New York schedules. In carrying out the District Court's direction regarding the Philadelphia rates, the Commission should be permitted to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship. Accordingly, on the appeals before us, so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and the cause is remanded for appropriate disposition not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE AND MR. JUSTICE BLACK would affirm the judgment of the District Court.

APPENDIX C.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.

The Baltimore and Ohio Railroad Company, Canton Railroad Company, Western Maryland Railway Company, Baltimore Association of Commerce, The Baltimore Chamber of Commerce, The Steamship Trade Association of Baltimore, Inc., Baltimore Custom House Brokers and Forwarders Association, The Mayor and City Council of Baltimore,

Plaintiffs,

vs.

United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company, and C. W. Boin, Agent, and The New York Central Railroad Company and Erie Railroad Company,

Defendants.

Civil Action
No. 9237

DECREE.

The decree of this Court entered herein on May 22, 1957 having been appealed to the Supreme Court of the United States, and that Court by its Order entered December 9, 1957, in *Interstate Commerce Commission et al.* v. *Baltimore & Ohio R.R. Co. et al.*, Nos. 463, 464, 465, 466, 467, 468 and 473, October Term, 1957, having held that it is not precluded that the Interstate Commerce Commission may find an interrelationship within the purview of the National Transportation Policy, among lawful tariffs to be established on imported iron ore from the ports of New York, Philadelphia and Baltimore to steel producing areas in

Pennsylvania, Ohio and West Virginia, that in this light it is appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore tariffs pursuant to the remand of this court, the Commission should be free to reconsider and take action upon the New York tariffs, and that in carrying out this court's direction regarding the Philadelphia rates, the Commission should be permitted to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York, and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship, and the Court having ordered vacated so much of the decree of this court as did not affirm the order of the Commission of October 1, 1956 in *Iron Ore from Eastern Ports to Central Freight Association Points,* 299 I.C.C. 195, and the Court having remanded the cause to this court for appropriate disposition not inconsistent with its opinion of December 9, 1957, and counsel for the parties in interest having been heard.

Therefore this 18th day of March 1958, the Court adopts the findings of fact and conclusions of law, appearing in the Opinion filed herein on April 26, 1957, except as modified by the Opinion and Order of the Supreme Court; and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points,* should be (1) in part remanded to the said Commission to make more explicit findings, and (2) in part affirmed:

To Wit it is:

ORDERED, ADJUDGED AND DECREED.

1. That the decree herein of May 22, 1957 be, and it hereby is, vacated.

2. That the order of the Commission dated October 1, 1956 insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on import iron ore from Philadelphia filed to become effective February 9, 1953, is remanded to the Commission to make more explicit findings in accordance with the opinion of this Court filed herein as modified by the order of the Supreme Court.

3. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953 be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission, and that pending said reconsideration and final decision, rate parity on iron ore between ports of Baltimore and Philadelphia and the destinations here involved be retained.

4. That the order of the Commission dated October 1, 1956, insofar as it approves the tariff schedules on import iron ore from New York filed to become effective February 9, 1956, is remanded to the Commission to reconsider the lawfulness of such tariff schedules.

5. That pending reconsideration and final decision by the Commission pursuant to the remand, the tariff schedules on iron ore from New York filed to become effective February 9, 1953 shall not be made effective or permitted to become effective.

6. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import ore from Baltimore published to become effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to become effective February 16, 1953 and March 11, 1953.

/s/ MORRIS A. SOPER

Morris A. Soper
United States Circuit Judge.

/s/ W. CALVIN CHESNUT

W. Calvin Chesnut
United States District Judge.

/s/ R. DORSEY WATKINS

R. Dorsey Watkins
United States District Judge.

APPENDIX D.

The Interstate Commerce Act, Sec. 15 (7):

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by

whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

28 U.S.C. Sec. 1336.

§ 1336. Interstate Commerce Commission's orders.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. June 25, 1948, c. 646, 62 Stat. 931.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 465

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

No. 466

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Maryland

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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On Appeal from the United States District Court for the District of Maryland

---

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

These appeals present novel and important questions arising out of the following proceedings:

In February 1953, the railroads serving the ports of Philadelphia, New York and Boston published reduced rail rates on imported iron ore to certain points in the Youngstown, Ohio, area on the same level as those applying from Baltimore in an attempt to share in a new and expanding movement of iron ore from

foreign sources to the Youngstown area. The reduced rates from Baltimore had been made effective in October, 1950. Almost immediately, the Baltimore rail carriers, which had theretofore enjoyed a monopoly on this new traffic, published 20-cent reductions in their rates, and the Philadelphia carrier did likewise. The Interstate Commerce Commission suspended all of the proposed schedules and entered into an investigation concerning the lawfulness of the proposed rates under the provisions of Section 15(7) of the Interstate Commerce Act.

After lengthy proceedings, the Commission in October 1956 approved the equalizing rates published by the Philadelphia and New York carriers to the Youngstown area. The proposed equalizing rates from Boston were found not to be compensatory and were ordered cancelled.* The subsequently published 20-cent reductions from Baltimore and Philadelphia were also disapproved, the Commission finding that little if any evidence was offered to justify them. The New York rates were approved by the Commission after they were found to be compensatory, competitively necessary, not otherwise unlawful and consistent with the National Transportation Policy—the tests usually employed by the Commission in determining the lawfulness of carrier-proposed rates. Although the Commission was requested by the New York railroads to exercise its powers under section 15(1) to prescribe a parity of rates and by the Baltimore carriers to pre-

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* A statutory three-judge District Court for the District of Massachusetts affirmed the Commission's disapproval of the rates proposed from Boston in *Boston and Maine Railroad* v. *United States*, 153 F. Supp. 952, and those rates are not in issue here.

scribe differentially related rates, it refused to prescribe any rates, merely approving those rates which it found had been justified and disapproving those which had not been justified.

In a suit brought by the Baltimore railroads and supporting civic and commercial interests, a statutory three-judge District Court for the District of Maryland affirmed the Commission's orders insofar as they disapproved the subsequent 20-cent reductions from Baltimore and Philadelphia and, since no appeal was taken from that finding, the lawfulness of those rates is no longer in issue. With respect to the equalizing rates from Philadelphia, the District Court ordered the case remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to Baltimore and Philadelphia and as to the volume of such traffic passing through those two ports.* Pending such findings, the District Court order permits the equalizing Philadelphia rates to remain in effect.

The District Court vacated the Commission's orders insofar as they approved the equalizing rates from New York to the Youngstown area and permanently enjoined the Commission from "taking, authorizing, approving or permitting any action, by any railroad company" which would have the effect of establishing or making such rates effective. Thus, the equalizing rates from New York have never been allowed to become effective and under the District Court order could not be established now or in the future.

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* The equalizing rates from Philadelphia became effective on February 19, 1954, after Division 2 of the Commission unanimously approved the Philadelphia rates but by a 2-to-1 vote disapproved the New York rates.

The opinion of the District Court makes it clear that it did not understand the nature or effect of the Commission's action which it was reviewing. In this proceeding the Commission merely passed upon the lawfulness of carrier-proposed rates and refused to prescribe any rates. The District Court, however, construed the Commission's decision as determining the proper rate relationship between the ports and as prescribing a parity of rates to be observed in the future. In the opening paragraph of its opinion, the District Court states that the suit was brought to set aside decisions and orders of the Commission "which prescribe parity of railroad rates."*

The District Court, obviously failing to appreciate the distinction between voluntary rate action by carriers and prescription of rates by the Commission over carrier objections, held that the Commission did not make the necessary findings to justify its action, which the District Court variously characterized as a "striking down of the long established differential in favor of Baltimore"** or as an adjustment of "rates and differentials for the purpose of diverting traffic from one locality to another." In its opinion the District Court refers to and evidently accepts the Commission's

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* In other parts of its opinion, the District Court correctly states that the Commission merely approved equalizing rates from Philadelphia and New York, but the District Court makes it clear that it considers this to be tantamount to or in effect a prescription of parity rates.

** The District Court erroneously holds that the differential-rate adjustment applying from the four ports of Baltimore, Philadelphia, New York and Boston to the Youngstown area on merchandise traffic also applied on iron ore traffic, although the Boston rate on iron ore has never been related to the others and no iron ore ever has moved through New York to the Youngstown area.

findings which justified and required approval of the carrier-proposed New York rates, but holds these findings insufficient to justify the prescription of rate parity by the Commission, which the District Court erroneously assumes was the Commission's action.

ARGUMENT.

1. In their Motion to Affirm,* the Baltimore railroads, who are mainly responsible for the District Court's confusion as to the nature of the Commission's action, for the first time correctly describe the Commission's action with respect to the New York rates as follows (Motion to Affirm, p. 23):

> In this proceeding the only action taken by the Commission was to approve as "just and reasonable" under Section 15(7) a reduced rate from New York which was the same as the rate from Baltimore. The Commission did not prescribe parity as a principle to govern future rate-making, nor did it make any findings which would preclude rates on different levels if justified by a different record.

With this statement, these appellants have no quarrel.** What follows, however, is subject to serious objection. On the next page of their Motion to Affirm, the Baltimore railroads go on to say:

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* The arguments and contentions in all three Motions to Affirm are substantially the same and this brief is in reply to all three, although specific reference is made herein only to that filed by the Baltimore & Ohio Railroad and the Western Maryland Railway.

** With respect to the Philadelphia equalizing rate, the Baltimore railroads still try to argue at page 13 of their Motion to Affirm that "the Commission required (or 'prescribed') parity."

> Accordingly, the effect of the District Court's judgment is to preclude from New York the same rate as from Baltimore on the basis of the present record. In no way, however, would the order of the District Court operate to prevent the New York appellants, if they should want to try again, from seeking to justify on a different record the same rates which, on this record, the District Court enjoined. Nor would the order of the District Court stand in the way of the Commission's reopening the proceeding either on petition or by its own initiative. Thus a continuance of the administrative process is not cut off. On the contrary, its continuance depends on the initiative of the New York appellants in bringing another proceeding under Section 15(7), or action by the Commission in continuing the present proceeding.

Having misled the District Court into believing that the Commission had prescribed a parity of rates and having secured a reversal by the District Court, the Baltimore railroads now urge this Court to affirm the District Court decision by attempting to mislead it as to the nature of the District Court's decree. The District Court's decree (Jurisdictional Statement of these Appellants, Appendix B, page 41a) in the first paragraph vacates the Commission's order insofar as it approves the equalizing rates from New York and in the third paragraph directs the Commission to make and enter an appropriate order requiring the New York railroads to cancel their schedules. If, as the Baltimore railroads contend, the District Court intended to leave the New York carriers free to file new schedules proposing equalizing rates and justify them, these two paragraphs would have sufficed. But the District Court, in the second paragraph of its decree, makes permanent a restraining order which enjoins

the Commission "from taking, authorizing, approving or permitting any action, by any railroad company" which would *have the effect* of establishing or making effective the equalizing rates from New York. Thus, contrary to the contention of the Baltimore railroads, the New York carriers would never be able to make effective equalizing rates from New York if the District Court's order is affirmed.

The argument of the Baltimore railroads only makes it clear that the District Court's decision should be reversed and the Commission's decision should be affirmed. Although the District Court's decree prevents the New York carriers from publishing equalizing rates, there is nothing in the decisions or orders of the Commission or the District Court which prevents the Baltimore carriers from publishing any reduced rates they desire and making effective any reduced rates whose lawfulness they can prove. The 20-cent reductions proposed by the Baltimore carriers were disapproved by the Commission because no serious attempt was made to justify them, and in fact the Baltimore carriers themselves urged their disapproval.* There is nothing to prevent the Baltimore carriers from filing new reduced rates, and if they can prove that such rates would be compensatory, no lower than necessary to meet the competition, not otherwise unlawful, and in accord with the National Transportation Policy, the Commission would of course have to approve such rates. The New York railroads who have successfully met these tests before the Commission in

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* The Baltimore carriers urged the Commission to disapprove all of the proposed schedules and to prescribe differentially higher rates from Philadelphia, New York and Boston than from Baltimore.

justifying their own rates should not be denied the right to participate in the movement of imported iron ore merely because the District Court did not understand the nature of the Commission's action.

If the District Court's decision is reversed and the Commission's decision is affirmed, the necessary facility could be built at New York and the iron ore traffic could start to move through that port. Unless the District Court's decision is reversed, the carriers serving New York are permanently deprived of their right to compete because of the Baltimore carriers' unsupported claims that such competition, if authorized, would be too keen.

2. After finally admitting the nature of the Commission's action and the principles under which the lawfulness of the rates from New York are to be determined, the Baltimore railroads now urge that certain tests were not met* or that the Commission's findings were not sufficiently specific. They argue that the Commission's findings were either inadequate or erroneous on the questions whether the New York rates are (a) lower than necessary to meet the competition, (b) in violation of the provisions of section 3(1), and (c) in accord with the National Transportation Policy. Now that they have been forced to admit the true nature of the Commission's action, the Baltimore carriers cannot successfully make such arguments. Even the District Court in its opinion referred, without apparent criticism, to the Commission's findings which the Baltimore railroads now claim were inadequate or not made at all. In its opinion (Jurisdictional State-

* Even the Baltimore railroads evidently concede that the New York rates are compensatory and just and reasonable *per se*.

ment of these Appellants, Appendix A, page 34a), the District Court states:

> It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system.

The District Court, however, was of the opinion that such findings did not justify the prescription of parity rates by the Commission (which it erroneously believed the Commission's action to be). It is too late for the Baltimore carriers now to claim that no such findings were made.

3. The argument on which the Baltimore railroads seem to place the heaviest emphasis is that in order to approve the equalizing rates from New York, the Commission had to make a specific finding that such rates would be in compliance with the provisions of section 3(1) of the Interstate Commerce Act and that it failed to do so. The District Court on the other hand, evidently felt that the Commission had made the necessary finding on this point as to the New York rates, but that the Commission erred in finding that section 3(1) would not be violated by a parity of rates which it erroneously believed the Commission had prescribed. The fact that the District Court reversed the Commission's decision and vacated the order as to the New York rates, instead of remanding for additional findings as it did with respect to the Philadelphia rates, seems to confirm this.

In a complaint brought under section 13 of the Interstate Commerce Act alleging that certain rates violate section 3(1), the Commission would of course have to make a specific finding that the rates do or do not violate section 3(1). An investigation under section 15(7) concerning the lawfulness of carrier-proposed rates of the type here involved, however, is a totally different proceeding. Section 15(7) provides that in such a proceeding "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." In the ultimate conclusions in its report, the Commission found that the equalizing rates from New York and Philadelphia "are just and reasonable." (299 I.C.C. 210) The carrier's burden to prove a proposed rate is "just and reasonable" does not mean that rates shown to be just and reasonable under section 1 will automatically be approved by the Commission. Where evidence is introduced tending to show that proposed rates would violate any other provisions of the act, the carrier's burden of proving the proposed rates "just and reasonable" includes the burden of rebutting such evidence, and the Commission must find the rates not otherwise unlawful before approving them as just and reasonable. In the same way that the carrier's statutory burden of proving proposed rates "just and reasonable," includes the burden of proving them not otherwise unlawful, so the Commission's formal finding that rates are "just and reasonable" necessarily includes a finding that they are not otherwise unlawful.

Although the Commission must, of course, make the "basic" or "quasi-jurisdictional" findings essential to the statutory validity of its order, the essential findings will vary with the context of the situation presented.

Alabama G.S.R. Co. v. *United States*, 340 U.S. 216. Here there can be no question that the Commission made the essential findings.

The proposed equalizing rates from New York to Youngstown were alleged not only to be in violation of section 3(1), but were attacked before the Commission on several other grounds. In addition to the allegation that the equalizing rates would result in undue preference of New York and undue prejudice to Baltimore, the rates were objected to on such various grounds as (a) being unduly low, (b) constituting a threat to the port-differential adjustment applicable on other import traffic, and (c) jeopardizing the entire iron-ore rate structure in violation of various sections of the act. To the extent that evidence was introduced to support these allegations, such evidence was considered by the Commission and was discussed in the Commission's two reports. After considering all the evidence, the Commission concluded that the rate reductions proposed by the New York and Philadelphia carriers were not unlawful. The Commission stated in its report (299 I.C.C. 208):

> It has long been recognized that carriers may, *within lawful bounds*, so adjust their rates as to secure a fair proportion of the traffic, as well as reasonably to foster the ports which they serve. *That appears to be what the respondents here have attempted to do.* (Emphasis added)

Obviously this meant that the proposed rates did not violate section 3(1), or section 1(5), or section 15a(2), or any other section on which the allegations were based. It was clearly unnecesssary for the Commission to refer to each section by number and make a separate finding that that particular section would not be violated.

There was no showing that equalized rates from New York would cause such a drastic diversion of traffic from Baltimore as to work undue prejudice to that port in violation of section 3(1). In fact, the Commission concluded that traffic at Baltimore will increase, even with equalized rates from New York. The Commission stated (299 I.C.C. 209):

> As stated by the division in the prior report, at page 554, the record is persuasive that the iron-ore tonnage through Baltimore will probably continue to increase even though rate parity is maintained at Philadelphia and this appears to be a reasonable assumption with rate parity also at New York.

Any contention that the Commission did not consider or pass upon the question of undue prejudice to Baltimore is obviously without merit.

It should be borne in mind that a rate schedule initiated by a carrier must be upheld as lawful by the Commission unless adequate reasons are presented for setting it aside. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499. Also, where the Commission finds rates under suspension not shown to be unlawful, the finding does not constitute approval or a prescription of the rates under suspension and they stand only as carrier-made rates. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671. If, after equalized rates are made effective and the necessary unloading facility is built at New York, it appears that Baltimore cannot compete with New York under equal rates, there would be nothing to prevent the Baltimore interests from publishing and making effective such lower rates as they can justify or filing a complaint against the New York rates as being in violation of section 3(1). But there was no evidence

on which the Commission could find that a violation of section 3(1) would result at the present time.

Although these rates apply on iron ore from all sources, from many of which New York is more distant than the competing ports, the Baltimore carriers tried to make it appear that only ore from Labrador was involved and argued that New York, being a shorter distance from Labrador, would have an undue advantage over Baltimore in the form of lower water costs to New York. Then, the Baltimore carriers failed to introduce any evidence by which the Commission could compute the amount, if any, of this claimed water-cost disadvantage. Now they are trying to capitalize on their failure to put in such evidence by contending that the Commission's report is deficient because it made no specific finding as to the amount of this claimed water-cost disadvantage.

Even if there were some substance to the Baltimore claim of a water-cost disadvantage on Labrador ore, the evidence made it clear that the New York carriers would have a chance to compete under equalized rates only for a small fraction of the Labrador ore. The New York equalizing rates would apply to only 7 points, while those of the Baltimore and Philadelphia carriers apply to 17 points. About 90 percent of the Labrador ore production is controlled by steel companies whose plants are located at points not reached by the New York carriers and by a company tied to Philadelphia by virtue of its operation of the ore-unloading facility at that port. The New York carriers would have a real opportunity to compete only with respect to the remaining 10 percent of the Labrador ore.

In the present factual situation, the Commission made all the findings which it was possible for it to

make and all the findings which are essential to the statutory validity of its order.

The Baltimore carriers' contention that the Commission did not make the necessary findings is inconsistent with the District Court's opinion, which seems to hold that the Commission made a finding on the section 3(1) question as to the New York rates, but that the finding was incorrect. The District Court does not say so in so many words, but in various parts of its opinion, makes general statements of principle such as:

> Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. (Jurisdictional Statement of these Appellants, Appendix A, page 32a)

Since the District Court did not remand the cause to the Commission with respect to the New York rates, it must be concluded that the Court believed the necessary findings had been made, but that the section 3(1) finding was erroneous.

The District Court's opinion makes clear its conclusion that the prescription of parity rates, which the Court erroneously believed the Commission had specifically or in effect accomplished in this proceeding, would violate section 3(1). The two main reasons for this conclusion seem to be the Court's belief that (1) rates must reflect differences in distance and (2) carriers cannot be forced to depart from voluntarily maintained, long-established differential rate relationships. Whatever may be the weight to be accorded such arguments where the Commission prescribes rates over carrier objections, they obviously do not apply where, as here, the carriers themselves wish to disregard differences in distance for competitive reasons and publish

equalized rates without which they could not compete. See *New York Central R. Co.* v. *United States*, 99 F. Supp. 394, affd. *Interstate Commerce Commission* v. *New York Central R. Co.*, 342 U.S. 890.

It has long been established that the question of whether undue preference or prejudice exists is for the Commission and its finding, supported by substantial evidence, is conclusive unless there was some irregularity in the proceeding or some error in the application of rules of law. It is beyond the province of the Court to consider the weight of the evidence before the Commission or the soundness of the reasoning by which its conclusions were reached. *Virginian Ry. Co.* v. *United States*, 272 U.S. 658. Here, the District Court has violated this long-established principle and substituted its own judgment for that of the Commission.

CONCLUSION

It is therefore respectfully submitted that the Motion to Affirm should be denied and that this Court should note probable jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants*,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.
No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.
No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

ANSWER OF THE BALTIMORE AND OHIO RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY AND CANTON RAILROAD COMPANY, APPELLEES, TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT.

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May 21, 1958.

The Daily Record Co., Baltimore 3, Md.

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BRIEF OF THE BALTIMORE AND OHIO RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY AND CANTON RAILROAD COMPANY, APPELLEES, IN OPPOSITION TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT.

Come now, The Baltimore and Ohio Railroad Company, Western Maryland Railway Company and Canton Railroad Company, appellees, in answer to appellants' Motion and Brief to Recall and Clarify the Judgment of this Court issued to the United States District Court for the District of Maryland on January 9, 1958.

STATEMENT

These appellees' contend that the question which appellants seek to bring before this Court is not the proper subject for a motion to recall and clarify judgment; that this question could only have been properly raised by a timely appeal from the decree and order of the District Court entered March 18, 1958; and that the time in which such appeal could have been properly taken has expired. In support of this position, these appellees adopt the brief of the Maryland Port Authority, et al., appellees, in opposition to appellants' motion.

Moreover, aside from the point of procedural defect, appellants' motion states no grounds warranting any action by this Court to recall and clarify its judgment.

The Interstate Commerce Commission by its order dated October 1, 1956 found, *inter alia*, that rates on import iron ore from New York made the same as the rates applicable from Baltimore were justified. The appellees here, among other parties, attacked the Commission's order by complaint filed in the District Court for the District of Maryland. That Court, upon a finding that irreparable damage to appellees would result if the equalizing rates from New York were made effective, immediately issued a temporary restraining order staying the Commission's order approving the New York rates and enjoining the appellant railroads from making them effective pending review and decision by the Court. After review the District Court vacated the Commission's order with respect to the New York rates and entered a permanent injunction against making them effective.

The New York railroads, appellants here, thereupon appealed the cause to this Court. In its judgment dated December 9, 1957 this Court did not criticize or reverse the

District Court's determination that the aforementioned order of the Commission lacked substantial basis and thus should be vacated. This Court merely found that the District Court, instead of permanently enjoining the New York rates, should have remanded the issue to the Commission to enable that body to consider port and port rate interrelationships among Baltimore, Philadelphia and New York, and for further order. Pursuant to this mandate the District Court by its decree dated March 18, 1957 remanded the issue of the New York rates to the Commission and enjoined appellant railroads from making such rates effective pending reconsideration and final decision of the Commission pursuant to the remand.

Under these circumstances contrary to appellants' contentions, as appellees will develop fully in their argument, the District Court has the power to enjoin the New York rates pending reconsideration and final order of the Commission, and its action in so doing is:

1. Entirely consistent with the order and judgment of this Court; and
2. Not precluded "by necessary implication" of this Court's order and judgment.

In the same order referred to above the Commission also approved rates on import iron ore from Philadelphia made the same as applicable from Baltimore. This issue likewise was before the District Court on the complaint of these appellees among other parties. The District Court found the order approving the Philadelphia rates not justified by adequate findings and ordered that issue remanded to the Commission for further consideration and order. On appeal this Court upheld the order of the District Court.

The Philadelphia rates have been in effect since February 19, 1954 and a very substantial volume of iron ore has

moved under them through a costly unloading facility constructed at Philadelphia previous to approval of the Philadelphia rates by the Commission. Under these circumstances the District Court permitted the Philadelphia rates to remain in effect "upon the assumption that steps be taken to secure a prompt determination" of the issue by the Commission. There is a material difference between the situation as it pertains to the New York rates and that pertaining to the Philadelphia rates. The New York rates have never been effective and should not now be permitted to become effective, thus encouraging the construction of a costly high-capacity unloading facility at New York, until they are found lawful. To do otherwise would only compound the injury now being inflicted upon appellees by the Philadelphia rates — an injury clearly recognized by the District Court in its admonition for prompt action by the Commission pursuant to remand. The decree of the District Court, far from dealing more harshly with the New York rates than with the Philadelphia rates merely preserves the *status quo* and seeks to prevent a greater degree of injury to appellees than has already occurred. Such action is clearly within the power of the District Court.

ARGUMENT

Reply to Point One

Contrary To Movants' Argument, The Issuance Of An Interlocutory Injunction By The District Court Is Consistent With The Order And Judgment Of This Court.

The argument made by the movants is that when this Court, by its opinion and order of December 9, 1957, 355 U.S. 175, "vacated" "so much of the decree of the District Court as did not affirm the order of the Commission" it necessarily condemned any injunction against the New York rates, and the District Court thereupon became powerless to issue another injunction "pending reconsideration

and final decision by the Commission pursuant to the remand * * *."

The argument is specious. It is grounded upon a misconception of the action taken by this Court in its opinion and order of December 9, 1957.

When the appeals in these cases were presented to this Court last year, the District Court's order included a remand of the Philadelphia rates to the Interstate Commerce Commission and a "permanent" injunction against the New York rates. As a result of the appeals, the *only* change made by this Court was to direct the District Court to convert the "permanent" injunction against the New York rates into a remand to the Commission (along with the Philadelphia rates). The Court said it made this change because:

> "* * * we deem it appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, *the Commission should be free to reconsider* and take action upon the New York schedules. In carrying out the District Court's direction regarding the Philadelphia rates, the *Commission should be permitted* to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship." (355 U.S. at 178) (Italics supplied.)

It was in the light of this conclusion that the Court ordered to be "vacated" "so much of the decree of the District Court as did not affirm the order of the Commission," and gave the direction that—

> "the cause is remanded for appropriate disposition not inconsistent with this opinion."

Following this mandate, the District Court did in terms "vacate" its order requiring a "permanent" injunction against the New York rates and substituted an order (the one which is the subject of the present motion) which remanded these rates to the Commission and further provided:

> "5. That pending reconsideration and final decision by the Commission pursuant to the remand, the tariff schedules on iron ore from New York filed to become effective February 9, 1953 shall not be made effective or permitted to become effective."

Thus did the District Court change the "permanent" injunction into an interlocutory injunction[1] "pending reconsideration and final decision by the Commission pursuant to the remand." Not only was this action consistent with the opinion of this Court, but any other action would have been inconsistent. The clear purpose of the opinion of this Court was—

> "that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, the Commission should be *free to reconsider and take action* upon the New York schedules." (Italics supplied.)

This purpose is expressly and clearly served by the District Court's order. The Commission is indisputably "free to reconsider and take action upon the New York schedules" along with the remanded Philadelphia rates. This Court said that the objective of the remand was to find a proper and lawful "interrelationship" with respect "to all three ports". Under the terms of the District Court's order of remand, nothing stands in the way of the accomplishment of this objective.

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[1] See *United States v. U. S. Smelting Co.*, 339 U.S. 186 (1950), at 199.

Reply to Point Two

Contrary To Movants' Argument, This Court Did Not By "Necessary Implication" Preclude The District Court From Enjoining The New York Rates Pending Remand.

Here the argument seems to be that, while the District Court had power originally to enjoin the New York rates "as ancillary relief", it lost that power when:

> "The order of this Court terminated this litigation and withdrew the Commission order, which was the basis for the District Court's jurisdiction, from the further consideration of that Court."

And, say the movants, since:

> "there is no longer any 'order' before the District Court to which an injunction of the involved rates can be ancillary. * * * It is evident * * * that such an injunction was an assumption by the District Court of the bare power to suspend rates while they are before the Commission for its administrative determination of their reasonableness."

Again the argument is specious. It completely ignores the general equity power of the District Court to maintain the status quo pending further litigation.

The precise nature of the rates the movants are so anxious to make effective should be understood at the outset. They are *unlawful* rates — *unlawful* in the sense that the movants have not met their statutory burden of proving them lawful. Not only is this the unqualified finding of the District Court, but it is a finding which the Supreme Court, although asked to do so, did not change. On the contrary, the District Court was upheld on the merits, the only change being that the Supreme Court would give the movants another chance to prove their case before the Commission in the present proceeding.

Moreover, the movants have insisted since the start of this litigation that at New York there are no adequate facilities to transfer iron ore from ship to rail, and consequently, until they were built, Baltimore could not be hurt. From the unreported decision of the District Court granting a temporary restraining order pending hearing before the three-judge Court, the "flat statement by counsel for the New York Central and Erie" was "that these facilities were so inadequate that they would not result in the diversion of any iron ore from Baltimore."[2] The movants regard the building of "the necessary unloading facility * * * at New York" as having the same importance as "equalized rates" in attracting iron ore away from other ports such as Baltimore.[3]

Why, then, are the movants so anxious to dissolve the injunction and "share", as they insist in their present motion, "in the tremendous volume of import iron ore which their Philadelphia and Baltimore competitors have been monopolizing for the past 4 years?"[4]

The clear answer is indicated in the same unreported decision referred to above wherein, to avoid irreparable injury to Baltimore, the District Court granted a temporary restraining order pending consideration by the three-judge court.[5] The Court said:

> "The Court is impressed by the fact that, despite the claim that no diversion from Baltimore to New York could presently take place, the New York Central and Erie Railroads appear to be insistent upon making, or

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[2] *The Baltimore and Ohio Railroad Company, et al. v. United States of America, et al.*, Civil Action No. 9237, filed October 29, 1956, U.S.D.C. for Md.

[3] Brief in opposition to Motion to Affirm as filed in these cases by Erie Railroad, et al., at p. 12.

[4] At p. 4.

[5] See footnote 2, at pp. 7-8.

endeavoring to make, the new rates immediately effective and have declined voluntarily to withhold the institution of such new rates pending the decision herein by the three-judge court, although they have been advised that such court could convene in the very near future, and probably by the early part of December.

"During the course of the hearing it was developed that the Port of Philadelphia, prior to its new installation of ore-unloading facilities, had had no adequate facilities for the unloading of iron ore from ships, but that with the differential between Philadelphia and Baltimore in effect, $10,000,000 had been expended for modern iron ore unloading facilities, after which application had been made to the Interstate Commerce Commission for the elimination of the differential. According to the statements made during the hearings and uncontradicted, one of the arguments advanced before the Commission for the elimination of the differential was that if this were not done, these new facilities would be completely non-income producing. While there is no indication that any immediate modernization of ore unloading facilities will be made in New York, the Court cannot ignore the possibility that a rapid start might be made and a similar argument then made in support of the Commission's decision and order."

* * * * * *

"* * * the Court has no difficulty in finding that the risk of harm to the Baltimore interests from a failure to suspend the effectiveness of the Commission's order (such harm being both financial, i.e., inability to use unloading and loading facilities and interchange equipment in place and available, and from a precedent standpoint) is materially greater if the effectiveness of the Commission's order is not stayed than would be the harm to New York interests if it were stayed, pending determination on the merits by the statutory three-judge court."

Exactly the same considerations require injunctive relief "pending reconsideration and final decision by the Commission pursuant to the remand".

The power of the District Court to provide such relief is not open to question. It "is a power inherent in the Court, as a court of equity, and has been exercised from time immemorial." *Inland Steel Co. v. United States, et al.*, 306 U.S. 153 (1939) at p. 156.

In *Cantlay & Tanzola v. United States*, 115 F. Supp. 72 (1953), there was presented "the question * * * whether injunctive relief is required to preserve the status quo pending further proceedings before the Commission", and the argument was that to grant such relief would represent the suspension of carrier-made rates, a power "intrusted to the Commission only", citing *Board of Railroad Commissioners v. Great Northern Ry.*, 281 U.S. 412 (1930) at p. 429. In its decision the District Court, while recognizing "The Congressional intent * * * that the Courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission", went on to point out (115 F. Supp. at 83):

> "Nowhere does there appear any manifestation of Congressional intent to deprive the district courts of their inherent equity jurisdiction to employ the writ of injunction in maintaining the *status quo* pending hearing and determination of an action, see United States v. United Mine Workers, supra, 330 U.S. at pages 290-295, 67 S. Ct. 677, 91 L. Ed. 884, or 'in affording relief which it was the purpose of Congress to ensure', whenever such a course is necessary to the effectiveness of the court's decree. The Chicago Junction Case, supra, 264 U.S. at page 270, 44 S. Ct. at page 321, 68 L. Ed. 667."

In the cited case an injunction was not found necessary to preserve the status quo since the Court had previously ordered the restoration of the former rates and found that (115 F. Supp. at p. 84):

> "* * * it will not be possible in our opinion for the rail carriers again to lower the rates, without first filing schedules * * *. The Commission may thereupon proceed with a new investigation and suspension proceeding. * * * Finally, any order which might hereafter be made by the Commission, in either a new proceeding or the proceeding hereunder review, would be 'subject to challenge if not adequately supported * * *' and would moreover be subject to stay pending suit in the district court."

In the present case the equalized rates are already on file with the Commission and in the absence of an injunction pending the Commission's reconsideration, they would automatically go into effect — despite the fact that they are *illegal* rates, illegal in the sense that the Commission's order which sanctioned them has been upset in court. In these circumstances, injunctive relief pending remand is required to give Baltimore the same character of protection from irreparable injury as assured the protesting parties in *Cantlay & Tanzola v. United States, supra.*

In granting the present injunction pending remand the District Court acted within its statutory authority.[6] But

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[6] 28 U.S.C. sec. 2324 provides as follows: The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

5 U.S.C. sec. 1009(d) provides as follows: Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent

even if this statutory power is not expressly spelled out (to cover specifically an injunction pending remand) the District Court, acting as a court of equity, had an unquestioned right to forestall during remand the irreparable injury which otherwise would be inflicted upon Baltimore. In so acting the District Court is not circumscribed by the absence of statutory authority. *Virginian Ry. v. United States*, 272 U.S. 658 (1926) at p. 671.

The finding of irreparable injury has *already* been made in this case. See unreported decision cited in footnote 2. The present injunction of the District Court is necessary to guard against the same irreparable injury "pending reconsideration and final decision by the Commission pursuant to the remand". Such protection, so limited, is altogether consistent with the mandate of this Court.

CONCLUSION

In the absence of an injunction pending remand, the movants would be able to make effective rates on import iron ore which they have not justified and which have been found to be unlawful. Under the mandate of the Supreme Court, the movants will have another chance to prove their case, but until and unless they do so, Baltimore is clearly entitled to be protected from irreparable injury.

The threatened publication of these rates was found to inflict irreparable injury before the District Court had had an opportunity to pass on their merits. Now that their unlawful character has been judicially determined, the irre-

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irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

parable nature of the threatened injury is increased. Certainly the District Court, acting as a court of equity, is empowered to issue injunctive relief — limited, as required under the Supreme Court's mandate, to the period "pending reconsideration and final decision by the Commission pursuant to the remand".

Respectfully submitted,

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May 21, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY
vs. *Appellants,*
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees,*
No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees.*
No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF MARYLAND PORT AUTHORITY, BALTIMORE ASSOCIATION OF COMMERCE AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLEES, IN OPPOSITION TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

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The above-named appellees contend that the appellants' motion to recall and clarify this Court's judgment is an attempt to evade well-established limits on the jurisdiction

of this Court. The relief sought by the appellants is of the type obtainable, if at all, only by way of a direct appeal from the District Court's decree or by way of a timely motion for rehearing addressed to this Court. The time for taking either of such measures has already expired. In any event, the motion lacks merit for the reasons stated in the brief filed by the Baltimore and Ohio Railroad in opposition to the motion. We adopt that brief and endorse the argument there made.

STATEMENT

On October 1, 1956, the Interstate Commerce Commission entered an order approving certain railroad tariff schedules and disapproving others, all dealing with the shipment of imported iron ore from the Ports of New York, Philadelphia and Baltimore to seventeen points in so-called Central Territory. The effect of this order was to deprive Baltimore of the standard freight differential *vis-a-vis* New York and Philadelphia which had existed since 1877 and which had been repeatedly examined and approved by the Commission throughout the years. This result was accomplished by approving tariffs filed by the railroads serving New York and Philadelphia which disregarded the established differential while disapproving lower tariffs filed by certain of the railroads serving Baltimore which were designed to reinstate, at least partly, the differential.

Upon entry of the Commission's order, the Baltimore interests filed suit in the appropriate federal court to have it set aside to the extent that it approved the New York and Philadelphia tariffs and disapproved the Baltimore tariff. After extended hearings, the three judge District Court entered a decree on May 22, 1957 affirming the Commission's order insofar as it disapproved the Baltimore

tariff and vacating it to the extent that it approved the New York and Philadelphia tariffs.

For the reasons set forth in its opinion, the District Court: (1) held that essential findings necessary to support the Commission's approval of the Philadelphia tariff had not been made, (2) remanded the case to the Commission to make further findings and to reconsider the lawfulness of the Philadelphia rates in the light of such findings, (3) permitted the Philadelphia tariff to remain in effect pending such reconsideration by the Commission, and (4) enjoined the Commission from approving the New York tariff.

The New York and Philadelphia interests (including the parties making the present motion to recall) perfected an appeal to this Court. On the basis of the jurisdictional statements and motions, this Court entered a *per curiam* opinion and order dated December 9, 1957. It stated that, upon the remand of the case to the Commission, that body ought to be free to consider the interrelationship of the rates from New York with those from Baltimore and Philadelphia "and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship."

This Court, therefore, upheld the decision of the District Court that the New York and Philadelphia rates had not been shown to be lawful, but it directed the District Court to remand the New York rate to the Commission along with the Philadelphia rate and to make the terms of the remand broad enough to authorize the Commission to reconsider the relationship between all three ports and in the light of that reconsideration to take action upon the rates from each of the ports. This Court's opinion concludes with the statement that "so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and

the cause is remanded for appropriate disposition not inconsistent with this opinion."*

No motion for rehearing or clarification of the order of this Court was filed by any of the parties to the appeal.

The parties then submitted to the District Court their respective versions of the form of decree that ought to be entered consistently with this Court's opinion and order, and on March 18, 1958, the District Court entered a decree remanding the cause to the Commission as to both the Philadelphia and New York rates. In addition, the District Court directed that pending the Commission's reconsideration the Philadelphia rate, which was already in effect, should remain in effect, but that the New York rate, which had never gone into effect, should not be permitted to become effective.

Thereafter, the appellants filed the present motion to recall and clarify the judgment on May 1, 1958 — nearly five months after the entry of this Court's order and some month and a half after the District Court, acting pursuant to the mandate, entered the outstanding decree of which the appellants complain but from which they failed to appeal. In support of their motion, the appellants urge, apparently in the alternative, (a) that the District Court's decree of March 18th is contrary to the "plain meaning" of this Court's order and judgment and (b) that the decree is, at least, contrary to the "necessary implication" of the order. In addition, a careful reading of the motion will disclose a semi-voiced third contention, namely, that even if the

* The District Court's decree had affirmed the Commission's disapproval of (1) the rates filed by the Baltimore carriers to re-establish, in part, the differential if the New York and Philadelphia rates should be approved and (2) the rates filed by the Philadelphia carriers to match these lower Baltimore rates. It is this portion of the District Court's decree which was left unmodified.

District Court's action is consistent with this Court's order, that order should be "clarified" so as to prohibit *nunc pro tunc* the District Court's attempt to maintain the *status quo* pending the Commission's further action on remand.

On this state of the record, we submit that the appellants are attempting to use a motion to recall as a means of collaterally attacking the lower court's decree. In support of that view and our contention that the motion should be denied we urge the following propositions:

(a) the appellants' contention that the lower court did not follow the mandate of the judgment of this Court can only be raised by a direct appeal from the decree complained of and no such appeal was taken within the time permitted by law;

(b) a motion to recall lies only to correct errors or jurisdictional faults in the judgment or mandate itself and cannot be used as a substitute for an appeal;

(c) the District Court's decree is in fact in strict conformity with this Court's order;

(d) the appellants cannot request a material change in an order of this Court except by way of a motion for rehearing and no such motion can be made at this time or at this stage of the proceedings.

ARGUMENT

I.

The District Court's Decree is Reviewable Only on Direct Appeal.

It has long been the rule that the actions of lower courts taken or purporting to have been taken pursuant to mandates of this Court are reviewable only by way of a

direct appeal from the order or decree complained of, or, in a proper case, by a writ of mandamus. *Re Potts*, 166 U. S. 263, 41 L. ed. 994; *Re Sanford Fork & Tool Company*, 160 U. S. 247, 40 L. ed. 414; *City National Bank v. Hunter*, 152 U. S. 512, 38 L. ed. 534. And a case, such as the present, where the matter complained of is the action of a three judge District Court pursuant to a remand from this Court in a case involving the I. C. C. is no exception to this rule. *Baltimore & Ohio Railroad Company v. United States*, 279 U. S. 781, 73 L. ed. 954.

This rule is applicable to the present case even though the District Court's decree staying the effectiveness of the New York tariff pending reconsideration by the Commission upon remand is not a final order since this Court has long held such an order to be an interlocutory injunction appealable under 28 U. S. C. 1253. In *United States v. United States Smelting, R. & M. Co.*, 339 U. S. 186, 94 L. ed. 750, the I. C. C. entered an order enjoining several railroads from performing certain switching and spotting services. On petition to a three judge District Court, it was held that the Commission's order was not supported by findings based upon competent evidence. Thereupon, the cause was remanded and the Commission temporarily enjoined from enforcing the original order. After remand, the Commission simply restated the ground for its action and reentered the original order, but took no further evidence. A second petition to the District Court resulted in the I. C. C. order being permanently enjoined. On appeal to this Court, the appellee contended that the appellant's failure to appeal the first decision of the District Court precluded an appeal from the second under the doctrine of the law of the case. In rejecting this contention this Court said (339 U. S. at 198-99):

"It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was in fieri. The Commission had a right on reconsideration to make a new record. Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 374, 375, 83 L. ed. 221, 230, 231, 59 S. Ct. 301. When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 U. S. C. A. §1253, F. C. A. title 28, §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case as it does for the kindred rule of res judicata."

In view of this well-established right to an appeal and the fact that the lower court did not *refuse* to act but entered a decree pursuant to the mandate, it would seem perfectly clear that a petition for mandamus would not be granted even if the same had been properly filed. *Ex Parte Fahey,* 332 U. S. 258, 91 L. ed. 2041; *Matter of Tiffany,* 252 U. S. 32, 64 L. ed. 443. The appellants' sole method of seeking a review of the lower court's decree is, therefore, by way of direct appeal.

Why the appellants failed to note an appeal within the thirty days permitted for appeals from interlocutory injunctions (28 U. S. C. 2101 (b)) must remain a matter of conjecture. However, it is perfectly clear that the appellants should not be permitted to take a belated appeal in the guise of a motion "to recall and clarify" this Court's judgment.

II.

A Motion to Recall Lies Only to Correct Errors or Jurisdictional Defects in the Judgment or Mandate Sought to be Recalled.

As we have seen, the appellants contend that the District Court entered a decree which they maintain is contrary to the mandate of this Court's judgment. There is not even the slightest suggestion that there is any error or jurisdictional defect in the order of this Court. And yet the presence of such an error or jurisdictional defect was the sole basis upon which motions to recall were granted in the relatively few cases in which such a procedure has been held proper.

Thus, motions to recall the judgment and mandate of this Court have been granted in cases where—

(a) this Court found that it lacked jurisdiction because of the collusive nature of the suit or otherwise. *Gardner v. Goodyear Co.*, 131 U. S. ciii App., 21 L. ed. 141; *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561.

(b) the judgment had been obtained by fraud of the successful litigant. *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U. S. 271, 88 L. ed. 1269.

(c) the judgment was entered under the mistaken assumption that the appellee had been notified of the appeal and was in default, whereas he had never been notified. *Ex Parte Crenshaw*, 15 Pet. 119, 10 L. ed. 682.

(d) the mandate is either inconsistent with the opinion or otherwise fails to give effect to the judgment. *Sibbald v. U. S.*, 12 Pet. 488, 9 L. ed. 1167; *Central National Bank v. Stevens*, 171 U. S. 108, 43 L. ed. 97.

(e) the mandate contained mere clerical errors or omissions. *Bank of Ky. v. Wistar*, 3 Pet. 431, 7 L. ed. 731; *Schell v. Dodge*, 107 U. S. 629, 27 L. ed. 601; *Killian v. Ebbinghaus*, 111 U. S. 798, 28 L. ed. 593.

(f) an appeal was erroneously dismissed prior to the time that it was actually docketed. *U. S. v. Gomez*, 23 How. 326, 16 L. ed. 552.

(g) the mandate erroneously remanded the case to the District Court instead of the Court of Appeals. *Palermo v. Luckenbach Steamship Co., Inc.*, 355 U. S. 910, 2 L. ed. 2d 3; *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183, 100 L. ed. 1075; *Boudoin v. Lykes Brothers Steamship Co., Inc.*, 350 U. S. 811, 100 L. ed. 727.

The appellants have failed to cite (and we to find) any case in which a motion to recall has been granted to review the action of a lower court taken or purporting to have been taken pursuant to a mandate of this Court. In fact, the only cases cited by the appellants in support of their novel procedure — *Cahill v. New York, N. H. & H. R. Co.*, *supra* and *Palermo v. Luckenback S. S. Co.*, *supra* — both dealt with cases where this Court erroneously remanded the cause to the District Court instead of the Court of Appeals, as can be seen from the above tabulation.

In short, a motion to recall has never been used to review the actions of a lower court and it must also be kept in mind that any such use, if permitted, would tend to disrupt the orderly procedure painstakingly established by the rules of this Court governing appeals.

III.

The District Court's Decree is in Strict Conformity With This Court's Order.

As has been pointed out, this Court's order vacating the District Court's original decree was based solely upon a determination that the Commission should be allowed to consider the relationship of the three ports in question and to enter such order with respect to all three as it found the interrelationship to require. The present decree of the District Court permits just that. It remands the cause to the Commission for reconsideration of both the New York and Philadelphia tariffs in light of this Court's order.

The appellants overlook the fact that this Court did not *reverse* the District Court; it did not hold the New York tariff to be lawful. On the contrary, this Court's order approved the District Court's original decree to the extent that it found that there was no substantial basis to support the Commission's finding that the New York rate was lawful. The only action of the District Court with which this Court disagreed was its failure to remand the New York tariff so that the Commission would be able to consider the entire relationship of the three ports and pass such *new* orders as it determined to be necessary. There is not the slightest indication in this Court's order that it intended to require the District Court to permit the New York tariff to become effective pending the I. C. C.'s determination.

Accordingly, it can readily be seen that the determination by the District Court in its second decree that the New York tariff should not go into effect was in no way inconsistent with the mandate. If the appellants felt aggrieved by the relief granted, they had the right to appeal.

However, inasmuch as they did not see fit to take a direct appeal from the decree, they should not be allowed to attack it collaterally by way of a strained construction of this Court's mandate and an argument that the District Court's decree is inconsistent with the mandate as so construed.

Realizing full well that the plain meaning of this Court's order directly refutes their "plain meaning" argument, the appellants resort to "necessary implication" as an alternative approach. Their argument on this point runs as follows: (a) this Court's order removed the Commission's order from further consideration of the District Court whose only remaining function was to act as a mere conduit for the transmission of the cause back to the Commission; (b) having been thus deprived of jurisdiction over the I. C. C. order, the District Court was without jurisdiction to enjoin the tariff inasmuch as the power to so enjoin can not be exercised "apart from the jurisdiction to enjoin a Commission order"; (c) this Court would never pass an order which would permit the District Court to exceed its jurisdiction; (d) therefore this Court's order (or, we suppose, its "necessary implication") must be construed so as to prohibit the District Court from staying the effectiveness of the New York tariff.

To this argument there are numerous answers; we will discuss but two*.

First. Although argued as if the appellant's real contention were that the lower court's action was contrary

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* It is pointed out in the brief in opposition filed by the Baltimore & Ohio Railroad (pp. 7-12) that the District Court does in fact have jurisdiction to stay the effectiveness of a tariff pending reconsideration by the Commission after a remand. As previously noted, we adopt the argument of the B. & O.

to this Court's mandate, it is perfectly clear that the essence of the argument is that the District Court lacked jurisdiction to maintain the *status quo* pending reconsideration of the Commission pursuant to the remand. Even if this contention had merit, it obviously can not be made in the present proceeding.

The District Court had jurisdiction of the parties and the general subject matter, i. e. suits to set aside and enjoin orders of the I. C. C. This being the case, even if a particular action which it took was beyond its jurisdiction the decree can not be collaterally attacked; it is binding on all parties until set aside on direct appeal. *Chicot Co. Drainage Dist. v. Baxter State Bank,* 308 U. S. 371, 84 L. ed. 329; *Stoll v. Gottlieb,* 305 U. S. 165, 83 L. ed. 104. As we have seen, the appellants failed to appeal from the decree within the thirty days allowed by law and are therefore bound by the decree and prevented from attacking it in the collateral manner now attempted.

Second. This Court's order did not relegate the District Court to the status of a mere mail chute. It did not prevent the lower court from taking any further "judicial action". On the contrary, all that it did was (1) vacate the decree so as to allow the Commission to reconsider the New York tariff in light of the relationship between the three ports and (2) remand the case "for appropriate disposition not inconsistent" with the order. Hence even if it be assumed that a federal court has no power to enjoin the effectiveness of a tariff "apart from the jurisdiction to enjoin a Commission order" it is obvious that the Commission's order was still "before the District Court" when it entered its staying order. The appellant's own test of jurisdiction is thus satisfied.

IV.

No Rehearing is Available at This Time or at This Stage of the Proceedings.

Even a cursory reading of the motion to recall will disclose one inescapable fact: the appellants' real complaint is not that the District Court acted contrary to this Court's order, but rather that this Court's order did not embody all the provisions which they would have liked to see incorporated in it. They would not have been content to remand the matter to the District Court for appropriate disposition — as this Court did. They would have entered an order which would have stripped the District Court of all discretion as to the formulation of specific equitable relief and would have prevented the lower court from using its power to maintain the *status quo* pending the further decision of the Commission. However, the mere fact that the appellants suppose "that, in view of the conclusion to which the court came, as expressed in the opinion, it ought to have entered a different decree from that which it saw fit to enter", affords no ground for the issuance of a motion to recall. *Elizabeth v. American Nicholson Pavement Co.*, 131 U. S. cxlviii App., 24 L. ed. 1059.

If the appellants were dissatisfied with the scope of the relief granted by this Court, Supreme Court Rule 58 gave them the right to file a petition for rehearing within 25 days after the entry of the order. No such petition was filed. Instead, the appellants waited until after the 25 days had expired, until after the lower court had acted pursuant to this Court's order, and even until after the time for appeal from the lower court's decree had expired, and only then did they file the present motion. We do not suggest that there are no cases in which a rehearing should be granted after the expiration of the 25 day period. We do, however, most strenously maintain that no such

rehearing should be granted in this case — regardless of the guise in which such a motion is made. For this Court has specifically held that no rehearing can be granted after remand to the lower court. *Peck v. Sanderson*, 18 How. 42, 15 L. ed. 262; *Browder v. M'Arthur*, 7 Wheat. 59, 5 L. ed. 397; *Sibbald v. U. S.*, 12 Pet. 488, 9 L. ed. 1167.

CONCLUSION

Unless orderly appellate procedure is to be disregarded, motions which collaterally attack lower court judgments must be denied. Appellants should not be encouraged to speculate on whether they can convince a lower court to enter a decree more favorable than that actually permitted by this Court's mandate and, if they fail, be allowed to obtain what is in essence a rehearing in an effort to broaden the mandate in their favor. In short, we submit that the appellants are time-barred from invoking any procedure for obtaining appellate review and should not be allowed to achieve the same result by way of indirection.

Respectfully submitted,

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No. 467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ARMCO STEEL CORPORATION, M. A. HANNA COMPANY, IRON ORE COMPANY OF CANADA, NATIONAL STEEL CORPORATION (WEIRTON STEEL COMPANY DIVISION), REPUBLIC STEEL CORPORATION, WHEELING STEEL CORPORATION, AND THE YOUNGSTOWN SHEET AND TUBE COMPANY, *Appellants*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

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September 16, 1957

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28 U.S.C. 2101(b)	2
Interstate Commerce Act	
Section 1(5)	4
Section 3(1)	4
Section 14(1)	4, 11
Section 15(1)	4
Section 15(7)	4
Section 15a(2)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No.

ARMCO STEEL CORPORATION, ET AL., *Appellants*,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Maryland

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JURISDICTIONAL STATEMENT

Pursuant to Rule 13, Paragraph 2, of the Revised Rules of this Court, Appellants, Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Corporation (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation and The Youngstown Sheet and Tube Company, intervening defendants below, submit herewith their statement disclosing the basis upon which the Supreme Court of the United

States has jurisdiction on appeal to review the final order, judgment and decree of the United States District Court entered in this cause on May 22, 1957. Notice of appeal was filed in the United States District Court on July 19, 1957. Substantial questions are presented by this appeal.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 151 F. Supp. 258. A copy thereof is attached as Appendix A. A copy of the final decree of the United States District Court, entered May 22, 1957, is attached as Appendix B. The opinions of the Interstate Commerce Commission, dated February 5, 1954 and October 1, 1956, are reported as *Iron Ore From Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527 and 299 I.C.C. 195,* respectively.

JURISDICTION

This action was brought under 28 U.S.C. § 1336 to enjoin and set aside, in part, an order of the Interstate Commerce Commission. The final decree of the United States District Court for the District of Maryland was entered on May 22, 1957. These appellants filed their notice of appeal in that court on July 19, 1957. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28 United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the decision, judgment and decree on direct appeal in this

* The Interstate Commerce Commission's order therein, entered October 1, 1956, is attached as Appendix C.

case: *Virginian Ry.* v. *United States*, 272 U.S. 658; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125; *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612; *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216; and *U. S.* v. *Great Northern R. Co.*, 343 U.S. 562.

QUESTIONS PRESENTED

1. Whether the U. S. District Court erred in holding that the order of the Interstate Commerce Commission dated October 1, 1956 insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953 is not supported by essential basic findings, and in remanding the proceedings to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in its opinion filed herein?

2. Whether the U. S. District Court erred in remanding the proceedings to the Interstate Commerce Commission, for more explicit findings as instructed by the Court in its opinion, by substituting the judgment of the U. S. District Court for that of the Interstate Commerce Commission on the issues involved when the findings and conclusions of the Commission that the railroad tariff schedules on iron ore filed to become effective on February 9, 1953 from Philadelphia to destinations in the Youngstown, Wheeling, Steubenville areas are just, reasonable and otherwise lawful under the Interstate Commerce Act and the National Transportation Policy are fully supported by substantial evidence on the whole record?

3. Whether the U. S. District Court erred both in its analysis, as set forth in its Opinion, of the Report

and Order of the Interstate Commerce Commission, dated October 1, 1956 in Investigation and Suspension Docket No. 6074, *Iron Ore From Eastern Ports to Central Freight Association Points,* and in its interpretation, and application to the evidence of record, of the provisions both of the National Transportation Policy [49 U.S.C. preceding Section 1] and of the Interstate Commerce Act, Sections 1(5), 3(1), 14(1), 15(1), 15(7), and 15a(2) [49 U.S.C. 1(5), 3(1), 14(1), 15(1), 15(7) and 15a(2)]?

4. Whether the U. S. District Court erred in remanding these proceedings to the Interstate Commerce Commission, to make more explicit findings as instructed by the Court in its opinion, by drawing inferences, findings and conclusions *de novo* from the evidence of record contrary to those of the Commission on the issue of the lawfulness of the carrier-initiated rates on iron ore from Philadelphia to the Youngstown, Steubenville, Wheeling areas, published to become effective February 9, 1953, when the inferences, findings and conclusions reached unanimously by all ten participating Commissioners, that the aforesaid railroad freight rates are in all respects lawful, are fully supported by substantial evidence on the whole record?

STATUTES INVOLVED

The National Transportation Policy [49 U.S.C. preceding § 1] and Sections 1(5), 3(1), 14(1), 15(1), 15(7) and 15a(2) [49 U.S.C. §§ 1(5), 3(1), 14(1), 15(1), 15(7), and 15a(2)] of the Interstate Commerce Act, as amended, the statutory provisions involved, are set forth in Appendix D hereto.

STATEMENT

This case comes before this Court on appeal from a judgment, order and decree of the United States District Court for the District of Maryland reversing in part and remanding to the Interstate Commerce Commission a decision and order of the I.C.C. pertaining to the lawfulness of the railroad freight rates on imported iron ore transported from Baltimore, Philadelphia and New York to 17 destinations west of Pittsburgh, Pa. in the so-called Wheeling, W. Va., Steubenville and Youngstown, Ohio steel producing areas. The specific destinations and the rates on iron ore which have been approved by the Interstate Commerce Commission, and which became effective February 19, 1954, are set forth in Appendix E attached hereto.

Until recent years the steel industry of the United States, and particularly that located in the Ohio, West Virginia and western Pennsylvania area, had been dependent upon the so-called upper lake ranges in Minnesota, Wisconsin and Michigan as the predominant if not all but exclusive source of iron ore consumed. This iron ore was transported via vessel to the lower Lake ports, whence it was transported by railroad to the destinations involved in this proceeding. A long-established characteristic of the domestic iron ore freight rate structure, approved by the I.C.C. after most thorough investigations, has been the availability through the years of *at least two ports* from which this iron ore could be transported to the interior consuming points *at a parity* of railroad freight rates.

With the enormous drain upon the domestic iron ore resources of the United States occasioned by two World Wars and the subsequent increasing need for iron ore in the expanding American economy, the steel

producing companies, including these appellants, embarked upon a program of development of foreign sources of this vital raw material. Since World War II there has been a steady and increasing importation of iron ore into the United States, from foreign sources such as Liberia, Venezuela, Brazil, Chile, Sweden, Peru, and in the last few years from Labrador.

For over fifty years a parity of railroad freight rates applicable to the transportation of iron ore from both Philadelphia, Pa. and Baltimore, Md. had been in effect to Pittsburgh, Pa. However, to points west of Pittsburgh, including the 17 destinations in the Wheeling-Steubenville-Youngstown area here involved, the railroad freight rates on iron ore from Baltimore, Md. were 20 cents per gross ton under those applicable from Philadelphia. As above noted, until recent years the movement of imported iron ore via these routes was non-existent or negligible.

In the light of the then prospective increasing movement of iron ore from foreign sources the railroads serving the ports of Baltimore and Philadelphia published reduced rates effective October 9, 1950 to Pittsburgh, Pa. again preserving the parity of rates on iron ore between the two ports. These appellants, receivers of iron ore in the Wheeling-Steubenville-Youngstown area, recognizing their need for imported iron ores, and engaged in competition with steel producers in the Pittsburgh district, likewise sought parity of iron ore rates from both Baltimore and Philadelphia to their destinations. Without such iron ore rate parity receivers of imported iron at Youngstown, Ohio, such as The Youngstown Sheet and Tube Company and Republic Steel Corporation, would be obliged to pay 20 cents per gross ton over the Pitts-

burgh rate if they routed iron ore from Baltimore, but 40 cents per gross ton over the Pittsburgh rate if they routed iron ore from Philadelphia. From Pittsburgh to Youngstown, using the Baltimore and Ohio Railroad [the dominant Baltimore line], the distance is 76 miles, whereas via the Pennsylvania Railroad [the dominant Philadelphia line], the distance from Pittsburgh to Youngstown is 66 miles.

After due consideration, the Pennsylvania Railroad voluntarily published, to become effective February 9, 1953, reduced rates on iron ore from Philadelphia to the 17 points in the Wheeling-Steubenville-Youngstown area at the same level as then in effect from Baltimore. For example, the rate of $2.71 per gross ton from Philadelphia to Youngstown was published, thus equalizing with Baltimore.

The railroads serving the ports of New York, N. Y. and Boston, Mass. likewise published reduced rates on parity with Baltimore, to seven system or on-line points in the destination area. Thereafter the Baltimore lines published a reduction of 20 cents per gross ton in the iron ore rates to the destinations involved from Baltimore, to become effective February 16, 1953. This was matched in turn by another reduction of 20 cents per gross ton published by the Pennsylvania Railroad from Philadelphia to the 17 destination points, effective March 11, 1953. The Pennsylvania thereby sought to restore the railroad rate parity on imported iron ore with Baltimore.

All the foregoing tariffs publishing the reduced rates commencing with those scheduled to become effective February 9, 1953 were suspended and made the subject of an investigation as to their lawfulness by the

Interstate Commerce Commission. By decision of February 5, 1954, reported as *Iron Ore From Eastern Ports To C. F. A. Points,* 291 I.C.C. 527, Division 2 of the Commission unanimously upheld the lawfulness of the rates from Philadelphia to the 17 points initially published to become effective February 9, 1953. Pursuant thereto, such rates became effective February 19, 1954 and parity of iron ore rates from Philadelphia and Baltimore to the seventeen destinations in the Wheeling-Steubenville-Youngstown area has been maintained since that date. Division 2 in the same decision found all the other rates under investigation not shown to be just and reasonable, and ordered them cancelled.

On petitions of certain parties, the proceedings were reopened by the Interstate Commerce Commission and further hearings held. The Boston and Maine and the New York, New Haven and Hartford railroads, in connection with the Delaware and Hudson and the Erie, published a rate of $2.71 per gross ton on imported iron ore from Boston to the Youngstown area, scheduled to become effective October 21, 1954, and which was the same as that previously published from those origins by the Erie and the New York Central. These tariff schedules were also suspended and embraced within the investigation.

By decision of October 1, 1956, reported as *Iron Ore From Eastern Ports To Central Freight Association Points,* 299 I.C.C. 195, the entire Interstate Commerce Commission [with one of the eleven members not participating] unanimously affirmed the action of Division 2 in upholding the lawfulness of the rate from Philadelphia, originally published to become effective February 9, 1953, which had brought about a railroad

rate parity on iron ore between Philadelphia and Baltimore to the Wheeling-Steubenville-Youngstown area. Five Commissioners voted to extend parity with Baltimore to New York as well. One Commissioner voted to extend the rate parity to Boston. The tariff schedules from Baltimore and Philadelphia, originally scheduled to become effective on February 16 and March 11, 1953, were again found not shown to be just and reasonable and were ordered to be cancelled.

Action was brought in the U. S. District Court for the District of Maryland by the Baltimore and Ohio Railroad Co. and other Baltimore interests to enjoin and set aside in part the aforesaid order, report and decision of the Commission. By its decision of April 26, 1957, and its order, judgment and decree of May 22, 1957, the U. S. District Court reversed the Interstate Commerce Commission on the issue of extending iron ore rate parity with Baltimore to New York. The Court also concluded that the order of the Commission dated October 1, 1956 was not supported by essential basic findings (1) as to the relative costs of shipping imported iron ore to the ports of Baltimore and Philadelphia, (2) and as to the traffic therein to be reasonably expected at these ports, if rate parity between the ports is continued or if the rate handicap of 20 cents per gross ton is again imposed upon the Philadelphia route to the Wheeling-Steubenville-Youngstown area.

The appeal of Armco Steel Corporation, et al., is specifically directed against the latter segment of the decision, judgment, order and decree of the Court below, pertaining to the issue of iron ore railroad rate parity to the Wheeling-Steubenville-Youngstown area from Philadelphia and Baltimore.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents substantial questions as to appropriate governing principles of federal administrative law in determining the respective spheres of authority (1) of the Interstate Commerce Commission and (2) of the federal courts when engaged in judicial review of the orders and reports of the I.C.C. As indicated below, the questions presented are so substantial as to require plenary consideration by the Supreme Court, with briefs on the merits and oral argument, for their resolution.

I. IN ITS TREATMENT OF THE ISSUE OF IRON ORE RATE PARITY BETWEEN PHILADELPHIA AND BALTIMORE TO THE WHEELING-STEUBENVILLE-YOUNGSTOWN AREA THE COURT BELOW COMMITTED SERIOUS AND PREJUDICIAL ERROR IN ITS CONCLUSION AS TO THE NATURE OF THE FINDINGS REQUIRED OF THE INTERSTATE COMMERCE COMMISSION.

As previously indicated these proceedings are vast in their scope, were the subject of two separate sets of hearings and two separate reports, decisions and orders, first by Division 2 of the I.C.C., and, finally, by the entire Interstate Commerce Commission. In both decisions all Commissioners participating were unanimous in upholding the lawfulness of the Philadelphia-Baltimore rate parity effected by the rates published from Philadelphia which became effective on February 19, 1954.

Both reports of the Commission, reported at 291 I.C.C. 527 and 299 I.C.C. 195, respectively, embody careful narration and analysis of the evidence, the findings of fact and the conclusions of law made by the Commission.

The I.C.C. specifically recognized the actual and prospective importations of iron ore from several sep-

arate foreign origins. It gave consideration to the extensive complex of factors bearing upon this actual and prospective movement of iron ore through the ports of Baltimore and Philadelphia, including *inter alia,* the elements of ocean transportation costs and the actual and prospective tonnages. At some length the Interstate Commerce Commission set forth its findings, both subsidiary and ultimate, upon which it concluded unanimously that the Pennsylvania Railroad, and the interveners in support, had sustained the burden of proof with respect to the lawfulness of the carrier-initiated iron ore rates from Philadelphia to the Wheeling-Steubenville-Youngstown area, published to become effective February 9, 1953 and which, after I.C.C. approval, became effective February 19, 1954.

However, the Court below found the I.C.C. report somehow deficient because the administrative agency had not indulged in extensive additional elaboration of the ocean transportation costs from one of the origins, Labrador, to the ports of Philadelphia and Baltimore, and further because the I.C.C. did not, in practical effect, *go outside the record before it,* with respect to actual tonnage movements of iron ore to the respective ports after the record was closed.

It is submitted that no such detailed specificity of findings as contemplated by the Court below is required under the governing statute. The Supreme Court has gone to great pains to point out that the provisions of Section 14(1) of the Interstate Commerce Act do not require the Interstate Commerce Commission to make excessively detailed findings of fact in a case of this nature. *Alabama G. S. R. Co.* v. *United States,* 340 U.S. 216, 227, 228; *Luckenbach S. S. Co.* v. *United States,* 122 F. Supp. 824, 827, 828, affirmed

347 U.S. 984; *United States* v. *Louisiana*, 290 U.S. 70, 80.

The matter was succinctly expressed by Mr. Justice Cardozo, speaking for a unanimous court, when he stated, in *Mississippi Valley Barge Co.* v. *U. S.*, 292 U.S. 282, 286, 287:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

By that standard, on the issue of Baltimore-Philadelphia iron ore rate parity, the Court below was clearly in error in its conclusions as to the nature of the findings required of the I.C.C. in its report, decision and order.

II. THE COURT BELOW COMMITTED SERIOUS AND PREJUDICIAL ERROR IN SUBSTITUTING ITS JUDGMENT FOR THE FINDINGS AND CONCLUSIONS OF THE INTERSTATE COMMERCE COMMISSION WHICH WERE ADEQUATE IN THEMSELVES AND AMPLY SUPPORTED BY THE SUBSTANTIAL EVIDENCE OF RECORD.

It is to be noted that all ten members of the Interstate Commission who participated in the decision and order of October 1, 1956 were unanimous in upholding as lawful the parity of railroad freight rates on iron ore to the Wheeling-Steubenville-Youngstown area on the basis which became effective from Philadelphia on February 19, 1954. Whatever may have been the differences of opinion on whether the parity of railroad freight rates should be extended to New York, there was hard core unanimous agreement on the Baltimore-Philadelphia parity.

The Supreme Court has long recognized the complex problems involved in the matter of railroad rate

regulation, in assessing and evaluating the evidence presented in records before the Interstate Commerce Commission. See *Board of Trade* v. *United States*, 314 U.S. 534, 546. The I.C.C., which is the administrative rate maker, is accorded broad discretion. *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593. The balancing and weighing of these interests is a delicate task, regarded by this Court as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. *New York* v. *United States*, 331 U.S. 284, 347.

The Interstate Commerce Commission in its two decisions, reported at 291 I.C.C. 527 and 299 I.C.C. 195, evidenced a most careful analysis of the evidence of record. It considered a great complex of factors illustrative of which are: rate history, varying foreign sources of iron ore, comparative distances by ocean to the respective ports of entry including Baltimore and Philadelphia, comparative overland distances, facilities required at seaboard for receipt of foreign iron ore for transfer to railroad cars, the past, present and prospective tonnage movement of iron ore to the destinations involved, the basis for the carrier-initiated rates on iron ore under investigation, comparative earnings on the rates involved and other iron ore rates, as well as earnings on rates of other traffic, evidence as to comparative costs of transportation, the bearing of the provisions of the National Transportation Policy and of the Interstate Commerce Act.

That the court below would draw different inferences from those of the Interstate Commerce Commission is of no moment when a rational basis in the evidence of record for the I.C.C.'s conclusions appears

upon judicial review. At that juncture—and such is the case here—the judicial function is fulfilled. *Mississippi Valley Barge Co.* v. *U. S., supra,* 286, 287; *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 488.

It is submitted that the question here presented is substantial, requiring plenary action by this Court, on brief and oral argument. For the U. S. District Court, contrary to long-established principles of federal administrative law, particularly with respect to the Interstate Commerce Commission, in substance has gone beyond its proper sphere. The lower court has sought to substitute its judgment for that of the Commission on the issue of Baltimore-Philadelphia iron ore railroad freight rate parity. For, in disregard of the substantial evidence on the whole record, the court evaluated the wisdom and expediency of the I.C.C.'s decision, ignored the substantial evidence in the record as a whole in concluding that certain additional findings on issues already treated by the Commission should be made. In this the Court committed serious and prejudicial error. See *Interstate Commerce Commission* v. *Union Pacific Railroad Co.,* 222 U.S. 541, 547.

III. IN ITS TREATMENT AND DISPOSITION OF THE ISSUE OF PHILADELPHIA-BALTIMORE IRON ORE RAILROAD FREIGHT RATE PARITY TO THE WHEELING-STEUBENVILLE-YOUNGSTOWN AREA THE COURT BELOW COMMITTED SERIOUS AND PREJUDICIAL ERROR IN APPLYING INCORRECTLY TO THE EVIDENCE OF RECORD THE PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT AND THE NATIONAL TRANSPORTATION POLICY.

The question of the propriety of the approach taken by the court below in exercising the function of judicial review with respect to the findings and conclusions

of the I.C.C. on the issue of Philadelphia-Baltimore railroad iron ore freight rate parity is so substantial as to require plenary consideration by the Supreme Court, with briefs on the merits and oral argument for another compelling reason. We here refer to the question whether the U. S. District Court has misconstrued the pertinent provisions of the Interstate Commerce Act and of the National Transportation Policy.

Without seeking to treat this question in all its aspects at this stage, two facets can be discussed to illustrate its substantial importance, namely (1) the court's treatment of the matter of comparative overland distances between Baltimore and Philadelphia on the issue of undue and unreasonable preference and prejudice and (2) the court's treatment of the National Transportation Policy particularly in its bearing on a transportation system adequate to meet the needs of the national defense. For, in these two categories, *inter alia*, the court saw fit to draw different inferences and conclusions than the Interstate Commerce Commission.

The subject of comparative distances, including those from Baltimore and Philadelphia to the destination territory involved, was carefully considered and made the subject of precise findings by the I.C.C. in both of its reports. *Iron Ore From Eastern Ports To C.F.A. Points,* 291 I.C.C. 527, 539-541, 548-550, 553, 554; 299 I.C.C. 195, 201-202, 204, 208. The court below saw fit also to treat of the factor of distance, but stressed only short line distances or short tariff distances, reflecting differences of 47 miles and 24 miles respectively in favor of Baltimore as compared to Philadelphia. *The Baltimore and Ohio Railroad Co.*

v. *U. S. A.*, 151 F. Supp. 254, 275. This the Commission considered along with all the other evidence on this subject including for example, the fact, uncontroverted of record, that the actual operating route of movement on iron ore shipped via the Pennsylvania Railroad to the 17 destinations from Philadelphia is only 11 miles greater than via its actual operating route from Baltimore. *Iron Ore From Eastern Ports to C.F.A. Points,* 291 I.C.C. 527, 539, 540; 299 I.C.C. 195, 201. This is clearly within the category of *de minimis.*

The view of the Court below that the I.C.C. " . . . gave no weight whatever to the factor of distance . . ." is little short of incredible! *The Baltimore and Ohio Railroad Co.* v. *U. S., supra,* p. 275. It is also to be noted that despite the fact iron ore from both Philadelphia and Baltimore must pass through Pittsburgh to reach Youngstown and other points in the destination territory, the court below affirmed the I.C.C. and sustained Baltimore-Philadelphia iron ore railroad freight rate parity to Pittsburgh, without any apparent concern for the factor of differing distances, deemed so vital with respect to Youngstown and other competitive points a short distance beyond Pittsburgh.

The above clearly presents the vital question of whether the court below in an unwarranted manner has exceeded its power in reviewing the decision and order of the I.C.C. It is our position that such is the case in the light of a long series of decisions of the Supreme Court. See *Illinois Central R. Co.* v. *Interstate Com. Com.,* 206 U.S. 441, 466; *Interstate Com. Com.* v. *Union Pacific R.R.,* 222 U.S. 541, 547, 548; *Virginian Ry.* v. *United States,* 272 U.S. 658, 665, 666; *St. Joseph Stock Yards Co.* v. *United States,* 298

U.S. 38, 51; *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U.S. 297, 304; *Labor Board* v. *Waterman S.S. Co.*, 309 U.S. 206, 226; *U. S.* v. *Pierce Auto Lines*, 327 U.S. 515, 535, 536; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 488.

Without protracting the demonstration of the substantiality and the importance of the question here considered, suffice it to say that the court below indulged in similar serious and prejudicial error in its treatment of the National Transportation Policy, and most particularly with respect to the Congressional mandate that the national transportation system must be preserved and developed so as to be adequate, *inter alia*, to meet the needs of the national defense.

Extensive and compelling evidence was introduced in the record before the Commission as to the importance of having at least the two ports of Baltimore and Philadelphia on a railroad freight rate parity with respect to imported iron ore destined to the 17 destinations involved. The traditional availability of at least two ports of entry on iron ore railroad freight rate parity was shown with respect to domestic iron ore. This had been the practice in the interest of flexibility and efficiency of supply, particularly in view of the enormous difficulties involved in shut-down of iron and steel producing operations in the event of iron ore supply failure or undue delay in receipt of the ore. The experience in World Wars I and II with respect to the importance of usable and adequately equipped ports of entry on vital traffic was also treated in the evidence before the I.C.C. The fact was demonstrated that the costly facilities for the handling of import iron ore at Philadelphia required for receipt and transfer of the ore ultimately destined to the 17 points in-

volved simply could not be maintained and developed without railroad rate parity with Baltimore.

Without such Philadelphia-Baltimore rate parity in the event of war or national emergency, in the event of incapacity or over-burdening of the iron ore handling facilities at Baltimore, with completely inadequate facilities at Philadelphia, the national safety could very well be seriously threatened, if not actually jeopardized. Such a fundamental consideration of the national interest obviously supersedes any possible local interest at Baltimore looking to monopoly or quasi-monopoly of import iron ore traffic to the Wheeling-Steubenville-Youngstown area. The Commission considered all the evidence before it and found on the whole record that Baltimore-Philadelphia iron ore railroad freight rate parity was lawful in the light of the National Transportation Policy. *Iron Ore From Eastern Ports To C.F.A. Points,* 291 I.C.C. 527, 548, 554; 299 I.C.C. 195, 202, 209.

Reviewing the I.C.C. decision and order the court below glosses over the factor of the national defense as embodied in the National Transportation Policy. *The Baltimore and Ohio Railroad Co.* v. *U. S., supra,* p. 275. In essence the court substituted its own judgment for that of the Commission on this vital issue. The Supreme Court should here give plenary consideration to the propriety and lawfulness of such action by the court below. The final determination of this question is of the greatest importance to the application of the National Transportation Policy to the transportation industry.

IV. THE COURT BELOW COMMITTED SERIOUS AND PREJUDICIAL ERROR IN ITS TREATMENT AND DISPOSITION OF THE ISSUE OF PHILADELPHIA-BALTIMORE RAILROAD FREIGHT RATE PARITY TO THE WHEELING-STEUBENVILLE-YOUNGSTOWN AREA BY SUBSTITUTING THE JUDGMENT OF THE COURT FOR THAT OF THE INTERSTATE COMMERCE COMMISSION AND ORDERING THE PROCEEDING REMANDED FOR SO-CALLED ESSENTIAL BASIC FINDINGS ON OCEAN TRANSPORTATION COSTS AND PROSPECTIVE TONNAGE IMPORTATIONS OF FOREIGN IRON ORE, WHEN ADEQUATE FINDINGS THEREON WERE ACTUALLY MADE BY THE COMMISSION.

The Supreme Court should also give plenary consideration, after briefs and oral argument, to the question here presented as to the extent to which the court below was lawfully entitled to remand the proceeding to the I.C.C. for more explicit findings (1) on the question of ocean transportation costs and (2) prospective tonnages of foreign iron ore importations with respect to the ports of Philadelphia and Baltimore.

Actually the Interstate Commerce Commission made explicit, clear-cut and unequivocal findings on both of the above matters. The subject of comparative ocean transportation costs is made the subject of findings, for example, at pages 198 and 199 of the final report of the Commission. At pages 202, 203 and 209 of the same report the I.C.C. made clear findings on the subject of past, present and prospective tonnage movements of iron ore from foreign sources through the ports of Philadelphia and Baltimore. The I.C.C. found the record persuasive that the iron-ore tonnage through Baltimore will probably continue to increase with rate parity contemporaneously maintained at Philadelphia. *Iron Ore From Eastern Ports To C.F.A. Points,* 299 I.C.C. 195, 209.

These more than meet the requirements as to adequacy and specificity of findings by the Interstate

Commerce Commission. It is not the function of the reviewing court below to substitute its inferences and judgment for those of the Commission when, as here, the latter are clearly supported by substantial evidence. Neither is it the right or duty of the court below to apply its own notions of the detail in which a report and order of the Commisison should be written, so long as the I.C.C. has set forth the basic findings and conclusions required. Mere editorializing or mere selective refinement of language in the report and order of the federal administrative agency, at bottom, is all the court below has really done as the basis for its order of remand on the issue of Philadelphia-Baltimore iron ore railroad freight rate parity. In so doing, the court clearly went far beyond its authority and duty. See *United States* v. *Louisiana,* 290 U.S. 70, 80; *Mississippi Valley Barge Co.* v. *U. S., supra,* 286, 287; *Universal Camera Corp.* v. *Labor Board, supra,* 488; *Luckenbach, S.S. Co.* v. *United States,* 122 F. Supp. 824, 827, 828, affirmed 347 U.S. 984.

The lawfulness of the action of the court below in purporting to find deficiencies in the report and order of the I.C.C. with respect to essential findings and remanding the proceedings when the findings have actually been made by the Commission most certainly presents a substantial question within Rule 15(2)(g) of the rules of the Supreme Court.

CONCLUSION

For the reasons stated, it is submitted that the questions presented by this appeal are so substantial as to require plenary consideration by the Supreme Court of the United States, with briefs on the merits and

oral argument, for their resolution. We therefore, pray that jurisdiction be noted and that the order, judgment and decree of the court below be reversed in respect to the issues and questions raised by this appeal.

Dated at Washington, D. C. this 16th day of September, 1957.

Respectfully submitted,

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Attorney for:
Armco Steel Corporation,
M. A. Hanna Company,
Iron Ore Company of Canada,
National Steel Corporation
(Weirton Steel Company Division),
Republic Steel Corporation,
Wheeling Steel Corporation,
The Youngstown Sheet and Tube Company,

Appellants.

APPENDIX A

The BALTIMORE and OHIO RAILROAD COMPANY, Canton Railroad Company, Western Maryland Railway Company, Baltimore Association of Commerce, the Baltimore Chamber of Commerce, the Steamship Trade Association of Baltimore, Inc., Baltimore Custom House Brokers and Forwarders Association, the Mayor and City Council of Baltimore, Plaintiffs, and Maryland Port Authority, Intervening Plaintiff,

v.

UNITED STATES of America, Interstate Commerce Commission, the New York Central Railroad Company, Erie Railroad Company, and the Pennsylvania Railroad Company and C. W. Boin, Agent, Defendants

and

Armco Steel Corporation, M. A. Hanna Company, Iron Ore Company of Canada, National Steel Corporation (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, the Youngstown Sheet and Tube Company, the Port of New York Authority, the Chamber of Commerce of Greater Philadelphia, the Delaware River Port Authority, the City of Philadelphia, Port of Boston Commission, the New York, New Haven and Hartford Railroad Company, and the Boston Maine Railroad Company, Intervening Defendants.

Civil No. 9237.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

April 26, 1957

Before SOPER, Circuit Judge, CHESNUT and R. DORSEY WATKINS, District Judges.

SOPER, Circuit Judge:

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* Reported at 151 F. Supp. 258.

This suit was brought by the Baltimore and Ohio Railroad Company, Western Maryland Railway Company, Canton Railroad Company and certain civic authorities and commercial organizations of Baltimore, Maryland, to set aside decisions and orders of the Interstate Commerce Commission which prescribed parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia and New York to seventeen destinations in the eastern portion of the so-called differential or Central Freight Association territory. This area lies west of a line from Buffalo, New York to Pittsburgh, Pennsylvania and includes Youngstown, Ohio on the north, Wheeling, West Virginia on the south and other intervening steel producing points in western Pennsylvania, eastern Ohio and northern West Virginia.[1] The defendants, in addition to the United States and the Interstate Commerce Commission, include as original or intervening defendants the Pennsylvania Railroad Company which serves the port of Baltimore as well as the ports of Philadelphia and New York, the New York Central Railroad Company and the Erie Railroad Company which serve the port of New York, the Port of New York Authority, the New York, New Haven and Hartford Railroad Company and the Boston and Maine Railroad Company which serve the port of Boston, the Port of Boston Commission and divers producers and fabricators of steel in the differential territory.

The decisions of the Commission which are challenged in this proceeding mark the departure from a long established

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[1] Differential territory is defined in *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691, 692. The seventeen points, all consuming or storage centers for iron ore, are Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowellville, Niles, Struthers, Warren, and Youngstown, Ohio; Benwood, E. Steubenville, Follansbee, Weirton and Wheeling, W. Va.

practice which has kept the rates applicable to both import and export traffic to and from differential territory lower as to Baltimore than the other Atlantic ports. The differentials were first established in 1877 by agreement of the carriers serving the territory in order to avoid misunderstandings in respect to the geographical advantages of Baltimore, Philadelphia and New York, as affected by rail-and-ocean transportation, so as to equalize the aggregate cost of transportation between competing points in the west and the domestic and foreign ports reached through those cities. The differentials were arbitrary in a measure since they reflected only in part the lesser distances to Baltimore and Philadelphia as compared with the distances to New York and Boston, but they were established by compromise as the only means of advertising rate wars.[2] The differentials applied to all traffic eastbound and westbound, domestic and export-import, between Central territory and the north Atlantic ports. The differential on eastbound export traffic from the differential territory was 60 cents per ton less to Baltimore and 40 cents per ton less to Philadelphia than the corresponding rates to New York. On westbound import traffic the same differential applied to third or fourth class and special commodity rates. Rates to Boston were not to be less than those to New York on domestic or foreign freight. In 1880 an attempt was made to modify the agreement on the ground that changes had substantially equalized ocean freights but after arbitration by the Thurman Advisory Commission the differentials established in 1877 were reaffirmed.

While this arrangement originated in a voluntary agreement of the carriers it has been considered by the Commission from time to time during the past 60 years when it was brought to the Commission's attention by commercial

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[2] See *Maritime Assn., Boston Chamber of Commerce* v. *A. A. R. R. Co.*, 95 I.C.C. 539, 567; 126 I.C.C. 199.

interests in Boston, New York, Philadelphia and Baltimore, and in each instance has been found lawful.[3]

Prior to 1930 the differential was applicable to both domestic and import-export traffic. In that year the Commission removed all domestic class rates from the scope of the differential rate structure and prescribed new scales of class rates from the several ports, based primarily on distance.[4] Under this new arrangement the longer distances from the three other ports resulted in a differential on domestic traffic to and from Baltimore, which exceeded the long established differential in its favor on import and export traffic. The domestic first-class rates to Youngstown from Baltimore were fixed at $2.01 per hundred pounds, from Philadelphia $2.16 per hundred pounds, from New York $2.31 per hundred pounds, and from Boston $2.70 per hundred pounds. Since these rates did not cover import and export traffic the railroads in 1932 published new import and export class rates. These were made the same as the new domestic rates so far as Baltimore was concerned and the standard differentials in favor of Baltimore of 20 cents a ton with respect to Philadelphia and 60 cents a ton with respect to New York and Boston were preserved. The

[3] For a resume of the history of the differential, see *In the Matter of Differential Rates*, 11 I.C.C. 13 (1905); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151 (1936). It was also considered under varying circumstances in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C.C. 612 (1898); *In the Matter of Relative Rates upon Export and Domestic Traffic in Grain and Grain Products*, 8 I.C.C. 214 (1899); *Chamber of Commerce of N. Y.* v. *N. Y. C. & H. R. R. R. Co.*, 214 I.C.C. 155 (1912); *In the Matter of Import Rates*, 24 I.C.C. 78 (1912); *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691 (1929); *Lighterage Cases*, 203 I.C.C. 481 (1934); *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938); *State of New Jersey* v. *Baltimore & O. R. Co.*, 24 I.C.C. 581 (1941); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I.C.C. 165 (1941); *Ex Parte Grain from Buffalo to N. Y.*, 278 I.C.C. 31 (1950).

[4] *Eastern Case Rates Investigation*, 164 I.C.C. 314.

import-export class rates from the three cities last mentioned thus became generally lower than their domestic rates.

For some reason, that is not explained, the rates on iron ore from Philadelphia to Pittsburgh have been the same as those from Baltimore to Pittsburgh since 1903. This parity, however, prior to the present controversy, has been only a paper equalization since there has been practically no movement from Philadelphia to Pittsburgh and no attempt has been made by the Baltimore railroads to set up a differential on this traffic.[5]

In 1949, in response to complaints from steel producers in the interior calling attention to the increased volume of movement and other changed conditions, the carriers undertook a study of the rate structure and as a result the Baltimore and Ohio, the Western Maryland, the Pennsylvania and connecting lines established, as of October 9, 1950, reduced rates on iron ore from Baltimore to Pittsburgh and also to steel mills in differential territory to the west. The Pennsylvania made a like reduction on iron ore from Philadelphia to Johnstown and Pittsburgh. The new rates retained the regular port differential to destinations in differential territory and parity between Baltimore and Philadelphia on traffic moving to Johnstown and Pittsburgh. No action was taken at this time to establish revised rates on iron ore moving from ports other than Baltimore to differential territory, but the record of the conference of railroads shows that "it was understood the usual port differentials should be observed from the other north Atlantic ports."

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[5] In the seven years from 1946 to 1952, inclusive, 2,160,000 gross tons moved from Baltimore to the steel mills in Pittsburgh, and 652,500 tons from Baltimore to Johnstown. No tonnage moved from Philadelphia to Pittsburgh and only 8,333 tons, comprising one cargo, to Johnstown. During the six years from 1946 to 1953 inclusive, approximately 647,000 tons moved from Baltimore to the steel mills in the Youngstown area and none from Philadelphia.

In August 1951, the Pennsylvania, anticipating an increase in the volume of imported iron ore and conscious that it could not expect to share in the transportation of the commodity from Philadelphia to the interior without adequate unloading facilities at this port, announced that it would erect a modern unloading facility at Greenwich in South Philadelphia designed to cost not less than $10,000,000. It proceeded to erect such facility and had spent the greater part of this sum before publishing reduced rates on iron ore, effective February 9, 1953, to which reference will now be made. Unloading facilities were installed in Baltimore by the Canton Railroad in 1917.

It was against this background that the Interstate Commerce Commission, in the decisions now under review, gave its approval to parity of rates on iron ore moving from New York, Philadelphia and Baltimore to Central territory, but denied parity to Boston. The case grew out of the publication by the Pennsylvania of reduced rates on iron ore, effective February 9, 1953, from Philadelphia to the seventeen points in differential territory, and the simultaneous publication of like rates by the New York Central from the ports of New York and Boston, and by the Erie Railroad from New York to destinations in the Youngstown area on their lines. The effect of these publications was to reduce the rates on iron ore from Philadelphia, New York and Boston to Youngstown to $2.71 per gross ton, the same rate which applied to Baltimore.[6] In order to meet this reduction and to preserve at least in part the historic differential, the Baltimore and Ohio and the Western Maryland then published, to be effective February 16, 1953, a reduced rate of $2.51 per ton on iron ore from Baltimore to those of the seventeen points on their lines, thus restoring a 20-cent differential in favor of Baltimore as compared with the other three ports. No attempt was made by the Baltimore

[6] The rates are stated without the general increase approved in Ex-Parte No. 175.

railroads to restore the standard differential of 60 cents over New York and Boston.

The Baltimore and Ohio and the Western Maryland also published a reduction of 20 cents per ton, effective February 16, 1953, to Pittsburgh, Johnstown, Donora and Monessen in order to establish a differential on shipments of ore to Pittsburgh in accordance with the general port differential structure and to preserve a proper rate relationship between Pittsburgh and the other named cities. The Pennsylvania countered with a rate reduction of 20 cents per ton, effective February 16, 1953, from Philadelphia and Baltimore to the four named cities, and a further reduction of 20 cents in its rates from Philadelphia and Baltimore to the seventeen points in differential territory, effective March 11, 1953.

The Baltimore and Ohio, the Western Maryland and divers Baltimore interests protested the rate reductions by the other railroads and all of the above-mentioned reductions were suspended by the Commission pending an investigation instituted on February 6, 1953. This was followed by a hearing and oral argument, and an order of Division 2 of the Commission on February 5, 1954, which approved the reduction originally published by the Pennsylvania, effective February 9, 1953, giving Philadelphia a parity with Baltimore, but cancelled the tariffs of the New York Central and the Erie equalizing rates from New York and Boston with Baltimore. Division 2 also found that the February 16, 1953 tariffs of the Baltimore and Ohio and the Western Maryland, and the March 11, 1953 tariffs of the Pennsylvania were not just and reasonable and ordered them to be cancelled. The Pennsylvania then published a supplementary tariff making the equalization of rates effective February 19, 1954, whereupon the Baltimore interests filed suit in this court asking a restraining order pending reconsideration by the entire Commission. The court refused to issue the order on the ground that the administrative process had not been completed, with the result that parity rates from Philadelphia went into effect and have

since prevailed. The full Commission, on July 30, 1954, stayed its order cancelling the rates from Baltimore, New York and Boston and reopened the proceeding. Finally, on October 1, 1956, the Commission rendered its decision, finding that the February 9, 1953 rates from Philadelphia and New York were justified but that the February 16, 1950 rates from Baltimore, the March 11, 1950 rates from Philadelphia, and the February 9, 1953 rates from Boston were not justified and ordered them cancelled. In this proceeding we are concerned with the propriety of the Commission's action as to the rates from Baltimore, Philadelphia and New York.[7]

The modification of rates on iron ore by the railroads which serve the Atlantic ports in competition with Baltimore was brought about by important changes in business conditions involving an increased demand for steel and an increase in the importations of iron ore which theretofore had contributed little to the total volume of commodities transported by the railroads from the coast to the interior. The origins of the ore that has been and will be imported through the Atlantic ports have an important bearing on the controversy. No figures are available for the years 1955, 1956 or 1957 since the record before the Commission was closed on December 21, 1954, and the case is submitted to this court on the Commission's record. An outline of the conditio .s prevailing prior to and after World War II and until the Commission's record was closed is set out in the following excerpt from the report of Division 2 of the Commission:

> "Mines in northern Minnesota, Wisconsin, and upper Michigan have for many years been the sole or principal source of supply for the iron-ore requirements of steel mills in central and trunkline territories, the preponderance of the ore moving by rail to Lake Superior docks, thence by water to lower Lake Erie ports,

[7] By a subsequent decision filed on March 19, 1957, the Commission reaffirmed its decision as to the Boston rate.

and by rail beyond. Prior to the end of World War II in 1945, importation of iron ore was comparatively light and the preponderance of the ore imported was consumed in furnaces at or near the eastern seaboard. Some imported ore moved to steel mills in the Johnstown and Pittsburgh, Pa. areas but little, if any, moved to mills west thereof. A few shipments which moved to interior points were consigned to manufacturers of paint or other commodities not produced by the steel mills.

"Since the end of World War II, steel producers have developed sources of supply for iron ore in Venezuela, Chile, Liberia, Brazil, Sweden, and Cuba, and this basic raw material of the steel industry has been imported in large volume. Mines now being developed in Labrador by the Iron Ore Company of Canada will supply large quantities of iron ore for the furnaces of five steel mills in central territory which own stock in that corporation, and to other consumers. During the 6-year period from 1936 through 1941 from approximately 2,000,000 to 2,500,000 tons of iron ore were imported annually. The import movement declined drastically during World War II, reaching a minimum of 402,096 tons in 1943, most of which originated in Canada. Following the war, importation of iron ore increased from 1,189,300 tons in 1945 to 10,145,415 tons in 1951, the latter figure equivalent to over 4 times the prewar tonnage. In 1952, a strike occurred in the steel industry and approximately 9,760,300 tons of iron ore were imported during that year. It is estimated that within a few years 20,000,000 tons of iron ore will be imported annually, a substantial portion of which will move to furnaces in central territory. While ex-lake ore will continue to move from the Lake Erie ports in large volume, it will be replaced by imported ore to a greater extent than in the past."

The full Commission, in its report of October 1, 1956, commented upon the increase in importations of iron ore into the United States in the following excerpt from its decision:

"Iron ore imported into the United States in 1948 originated in 28 foreign countries and aggregated 6,-

091,677 gross tons. By 1953 the tonnage had increased to 11,074,035 gross tons. The principal exporting countries in this period were Chile, Sweden, Venezuela, Brazil, Liberia, and Peru. On and between August 26 and October 6, 1954, a total of 1,511,875 gross tons of ore were shipped from 13 foreign ports to north Atlantic ports. Of this amount, 776,851 tons (51 percent) entered the Port of Baltimore, 718,809 tons (48 percent) entered the Port of Philadelphia, and 16,215 tons (1 percent) entered the Port of Boston. There was no reported entry of ore at New York during this period. Approximately one-third of this ore originated at Seven Islands, Labrador, from which no tonnage moved prior to 1954."

Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953 and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus, in the eight months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation. The facilities at Sparrows Point have a capacity of 6,000,000 tons and those at Fairless have a capacity of 2,000,000 tons annually. None of the ore delivered to Sparrows Point moves to differential territory. We are concerned primarily with the importations of iron ore that are delivered to the railroads for transportation to interior points subject to the published rates.

Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation. From July 31, 1954, when these shipments began, to December of that

year, 1,375,747 tons were unloaded at Baltimore and Philadelphia; and it seems certain that this was merely a beginning, for, as the Commission said in its final report, the evidence leaves no doubt that "Labrador tonnage will increase to 10,000,000 tons in 1956 and probably to a greater extent in later years." In short, importations from Labrador may be expected to constitute at least one-half of all the ore imported. The proportion of this business which will come to Baltimore and Philadelphia, respectively, is foreshadowed, although imperfectly, by what happened in the last six months of 1954. In that period 744,017 tons came to Baltimore and 631,730 tons to Philadelphia. The Philadelphia tonnage would have been greater and the Baltimore tonnage less by 113,210 tons but for a strike which caused a diversion to Baltimore of tonnage consigned to Philadelphia.

The effect of the abolition of the differential between Philadelphia and Baltimore, which became effective on February 19, 1954, is shown to some extent by comparison of deliveries of foreign ore from all sources to railroad piers at the two ports in 1953 and 1954. In the first year Baltimore received 1,813,512 tons of which 808,875 were delivered to the railroads for shipment to the differential territory, while Philadelphia received 1,113,917 tons of which 687,994 tons were delivered to the railroads to be delivered, 20,561 tons to Pittsburgh and 667,433 tons to points east of Pittsburgh—none of it going to the differential territory. In 1954, Baltimore received 1,644,294 tons and of this 1,070,457 tons went to destinations west of Pittsburgh; while in this year Philadelphia received 1,564,844 tons of which 681,599 tons went to the differential territory.

The future movement of foreign ore to this country, especially ore from Labrador, is the all-important circumstance in this case. The Labrador deposits are owned by the Iron Ore Company of Canada, of which 27% is owned by the M. A. Hanna Coal and Ore Company and the balance by

five steel producers [8] owning plants west of Pittsburgh, including twelve or thirteen plants in differential territory. These corporations are entitled to share in the product in proportion to their interests. The steel producers in differential territory will use their shares and the balance will be sold, for the most part, to the Bethlehem Steel Corporation. All of the ore is shipped from Seven Islands, Labrador. While some of it will move by routes not involved in this proceeding, five or six million tons will move annually through Atlantic ports to inland furnaces. The ore will be carried in ships owned or chartered by the Iron Ore Company of Canada or the participating companies; and the record shows that, in order to save transportation costs by sea, the ore will be delivered, in case of parity of railroad rates, to the nearest port equipped with efficient unloading facilities. The Commission found that the one-way ocean distances from Seven Islands to the four Atlantic Coasts to be: Boston, 950 miles; New York, 1,187 miles; Philadelphia, 1,320 miles, and Baltimore, 1,475 miles. If the Chesapeake and Delaware Canal were used the excess distance to Baltimore over Philadelphia would be 26 miles, but the Commission found that the larger ore vessels cannot use the canal at present and probably would not use it if the canal were deepened. The evidence shows that a 20,000 ton ore carrier with a speed of 14 knots requires three days less steaming time on a round trip basis from Seven Islands to Boston, two days less to New York and twenty-one hours less to Philadelphia than to Baltimore; and that it costs $2,000 per day to operate such a ship. Abolition of the differential of 20 cents per ton in favor of Baltimore and the establishment of parity of railroad rates between Philadelphia and Baltimore would cause shippers to route Labrador ore destined for differential territory through the Port of Philadelphia.

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[8] National Steel Co., Republic Steel Corp., Armco Steel Corp., Tube Co., Wheeling Steel Corp.

Since the Commission's decision of October 1, 1956, took no account of any shipments subsequent to December 1954, the effect of the parity of rates between Philadelphia and Baltimore in the intervening period was not ascertained, although it might have been done before the decision was rendered. The record, however, throws some light, as we have seen, on the shipments in the limited period between February 19, 1954, when the Pennsylvania put the parity rates into effect, and December 1954. The evidence directed to this period, although necessarily meager, tends to confirm the opinion of experienced witnesses heard by the Commission, that under parity rates Labrador ore destined for differential territory will move through Philadelphia and not through Baltimore. The experience of the Canton Railroad emphasizes this conclusion. This is a shipping road with 37 miles of track in the Port of Baltimore, connecting with the Baltimore and Ohio and the Pennsylvania by rail and the Western Maryland by float. It construed the first unloading facilities in Baltimore in 1917, in which it has invested $5,000,000 in reliance upon the differential. It is largely dependent upon the importations of ore. In 1952, its tonnage of imported ore comprised 55% of its total of which 39% was iron ore; and in 1953, the corresponding percentages were 66% and 28%, respectively. In the first nine months of 1953, it received 499,000 tons of iron ore but in the same period in 1954 under parity this amount had diminished to 239,000 tons, a decrease of 52%.

A similar situation exists with regard to the much smaller amount of ore which is brought to this country from the Port of Monrovia in Liberia. This ore is controlled by the Republic Steel Corporation, which has furnaces in differential territory and carries the ore in its own ships. In 1952, 420,000 tons were imported and it was estimated that in 1953 the amount would be somewhat larger. Heretofore all or nearly all of this ore was delivered at the Port of Baltimore. The ocean distances (miles) from Liberia to the Atlantic ports are as follows: Boston, 3,920; New York, 3,973; Philadelphia, 4,074, and Baltimore, 4,194.

The iron ore brought in from South America and Scandinavia has little bearing on the question at issue. The Commission found that, in the first nine months of 1954, 94% of the ore which originated in Venezuela, Chile, Peru and Sweden was consigned to the United States Steel Corporation and the Bethlehem Steel Corporation. Bethlehem received about 6,000,000 tons, none of which moves to differential territory. It is estimated that United States Steel will receive about 7,000,000 tons annually, of which 2,000,000 tons will enter the United States through the Gulf ports and 2,000,000 tons more will be consumed at Fairless. There will be a substantial movement from the docks owned by the corporation at Fairless by rail to Pittsburgh. Facilities at Fairless permit the blending of the iron before shipment to Pittsburgh and this service will be improved, and when this is done the United States Steel Corporation will abandon its practice of importing through Baltimore the iron ore for use at Pittsburgh. The corporation is not interested in the rate from Baltimore but desires a lower rate from Fairless to Pittsburgh. Baltimore has an advantage as to distances over the other ports with respect to shipments of ore from South America, except Brazil, but a disadvantage with respect to the shipments from Scandinavia.

Adequate unloading facilities are essential to the delivery of iron ore at a point of entry. Canton Railroad, as we have seen, was the first to establish such a facility in Baltimore in 1917. The Western Maryland followed in 1930, and its facility with subsequent improvements can now handle three ships at a time. The Baltimore and Ohio pier was built in 1950 and 1951 and cost $5,000,000. The capacity of these three piers in Baltimore is 13,500,000 tons per year, based on a 15% use of specially designed ore carrier type ships, and if the use of such ships is raised to 65% the total capacity will be increased to 22,275,000 tons per year. These facilities were constructed while the differential was in effect.

In March 1954, the Pennsylvania completed the first stage of its unloading facility at a cost of $11,000,000. The capac-

ity is from 3,000,000 to 6,000,000 tons of ore, depending on the type of ship. An enlargement, which would have increased the capacity of the facility by 50%, was ordered in 1954 and scheduled to be finished in 1955. The Pennsylvania contemplates an ultimate expansion which would enable it to treble its original capacity. It estimated that it needed 2,500,000 additional tons of ore per year to maintain its Philadelphia pier profitably. These facilities were established while there was parity of rates between Baltimore and Philadelphia on traffic moving to Pittsburgh.

Bethlehem at Sparrows Point and the United States Steel at Fairless each has its own unloading facility. The first has been in operation since 1946 and the latter since January 1953.

New York and Boston have no modern ore unloading facilities and only a very small tonnage of iron ore passes through these ports. Without parity of rates with Philadelphia and Baltimore no facility is planned at either location.

The relation of the rates to the distances for which iron ore is transported from the Atlantic ports to the differential territory is a factor necessary to be considered in this case since § 3 of the statute forbids a carrier to give any undue or unreasonable preference to any port or locality, or to subject any port or locality to any undue or unreasonable prejudice. The short line distances of the railroads from the several ports to Youngstown, Ohio, that is, the shortest physical routes over which traffic may be moved without transfer of lading, although through rates and routes may not be published, are as follows:

To Youngstown, Ohio

From	Short Line Distance miles	Difference in Distance over Baltimore miles
New York	490	112
Baltimore	378	—
Philadelphia	424	46
Morrisville	437	59
Boston	646	268

The short tariff route distances between these points, that is to say, the shortest routes from each port over which rates on iron ore are actually published, are as follows:

To Youngstown, Ohio

From	Short Tariff Route miles	Excess over the Shortest Tariff Route from Baltimore (W. Md.—381 miles)
Philadelphia:		
P.R.R.	428	47
Morrisville:		
P.R.R.	441	60
New York:		
Erie	569	188
N.Y.C.	612	231
Boston:		
N.Y.C.	670	289
B & M	661	280
N.Y., N.H., & H.	692	311

For reasons of convenience, the Pennsylvania moves iron ore traffic over longer and more circuitous routes from

both Philadelphia and Baltimore to Youngstown. The route which it uses from Philadelphia (434 miles) is practically the same as its short tariff route therefrom (428 miles); but instead of using its short tariff route of 404 miles from Baltimore, it carires the shipments 423 miles through Perryville, Maryland. If its actual operating route from Philadelphia is compared with its actual operating route from Baltimore, the difference in distance is only 11 miles; but if this operating route from Philadelphia is compared with the short operating route from Baltimore — that of the Western Maryland Railroad — Philadelphia's excess distance is 53 miles.

The decisions of the Commission are set forth in the report of Division 2 on February 5, 1954, 291 I.C.C. 527, and the report of the full Commission on October 1, 1956, 299 I.C.C. 195. The latter dealt principally with additional evidence adduced in the interval and seems to have adopted the report of Division 2 except that it approved the new schedules from New York to the Youngstown area which Division 2 had rejected. The reports recite in considerable detail the history of the differential, hereinbefore set out, and the contentions of the opposing sides[9]; and the findings

[9] The Commission noted the contentions of the Pennsylvania that parity between Baltimore and Philadelphia is necessary so as not to stifle the importation of iron ore through Philadelphia and so as to enable the steel producers to make proper use of the new facilities at Philadelphia; that the differential was never intended to apply to low-grade bulk material and hence parity did not constitute a departure from the former practice; that Baltimore did not object to parity with Philadelphia on traffic moving to the Pittsburgh area for 50 years and that all imported iron ore moves through Pittsburgh; that the commercial interests of Baltimore will not be injured since parity as far as the Pittsburgh area has not disrupted the general port differential adjustment and the great increase in imports of iron ore will provide ample tonnage for Baltimore's loading facilities. On the other hand, the Commission takes cognizance of the contentions that interests serving the port of Baltimore are entitled to reap the natural advantages flowing from its location; that parity would deprive Baltimore of these

of the Commission, which are sometimes mingled with the statement of the contentions of the parties, and the ultimate conclusions of the Commission are then set forth. They may be summarized as follows:

It is shown by a statement filed by the Pennsylvania in support of its claim to parity, which the Commission seems to have found correct, that parity of rates on iron ore applies both from Baltimore and Philadelphia to Steeltown, Pennsylvania, a steel producing point east of Pittsburgh; also from Baltimore and Philadelphia to Buffalo, although the route from Baltimore over the Baltimore and Ohio is 190 miles and that over the Western Maryland is 165 miles longer than the route from Philadelphia over the Pennsylvania. A similar comparison is made between routes from Baltimore and routes from Norfolk to steel mills in Ohio and Michigan as to which parity prevails, although the distances from Norfolk are from 25 to 192 miles longer than the distances from Baltimore. Likewise parity of rates but disparity of distances exist in rates from Lake Erie ports to steel mills in the Youngstown and Wheeling areas, as to which reference is made to the decision of the Commission in *Iron Ore Rate Cases*, 41 I.C.C. 181, in which the Commission pointed out that blast furnaces must be operated continuously and that it is of advantage to the steel producers and also to the operators of the vessels to have more than one port available. It was also shown that there is a movement of large quantities of eastbound ore from Erie and Buffalo to the steel mills at Bethlehem, Fairless, Philadelphia and Sparrows Point under a parity

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advantages and place the entire port differential rate structure in jeopardy by giving rise to demands for reduced rates on other imported bulk commodities; that the earnings on tonnage carried from Baltimore was substantially greater than on tonnage carried from Philadelphia to the differential territory because of the shorter distances from the former port; that parity of rates on iron ore from Baltimore and Philadelphia to Pittsburgh during the past 50 years should be disregarded because there was no movement from Philadelphia to Pittsburgh under this schedule.

rate of $2.71—notwithstanding the inequality of distances; and it was said that the earnings under the proposed rates from Philadelphia to steel mills in the Youngstown area compare favorably with the earnings under the $2.71 rate from Erie and Buffalo to eastern furnaces.

In both reports the Commission seems to have approved the contention of the Pennsylvania that there are only 11 miles difference between the transportation routes from Philadelphia and Baltimore to the differential territory and, therefore, the services from both ports are substantially identical. In its final report the Commission said:

> "The Pennsylvania urges also that rates from Philadelphia the same as those from Baltimore are justified by mileage and service factors. The average tariff-route distances over the Pennsylvania to the 17 destinations in differential territory are 422 miles from Philadelphia and 398 miles from Baltimore. Based on these distances, the equalized rates yield average ton-mile revenues of 6.4 mills from Philadelphia and 6.7 mills from Baltimore. The actual operating route of the Pennsylvania from Philadelphia is only 11 miles greater than its actual operating route from Baltimore. In both instances, the movement is via Pittsburgh, and approximately 75 percent of either haul is over the same tracks. Thus, the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore."

This statement seems to say that, in considering difference of distance between Baltimore and Philadelphia, the comparison should be made between the Pennsylvania's direct route from Philadelphia and its unnecessarily long route from Baltimore via Perryville, rather than between the tariff route of the Pennsylvania from Baltimore and the corresponding routes of the Baltimore railroads from Baltimore.

Division 2 of the Commission had little to say about the movement of the Labrador deposits because they had not begun to move prior to February 5, 1954, when the report

was filed. The Commission merely quoted an owner of stock in the Iron Ore Company of Canada as saying that five or six million tons of ore will be available for shipment in 1955 and that 10,000,000 tons are likely to be shipped in 1956. It is also pointed out that vessels of eighteen to twenty-eight thousand tons capacity will be used in transporting the ore to the north Atlantic ports; that a large number of railroad cars will be required; that economic necessity will require the movement to take the route from Seven Islands to the mills entailing the lowest transportation costs; and that alternate ports at equal rates are required in order to avoid congestion and to give the steel mills the opportunity to select the port to be used.

In the Commission's report, reference is made to its opinion In the Matter of Rate Differentials, 11 I.C.C. 13, which considered the Baltimore differential in 1905. The Commission said that at that time ocean rates favored the northerly ports but now iron ore moves in both chartered vessels and vessels owned by steel companies, and since 1920 ocean rates generally have been equalized with respect to voyage charters to the north Atlantic ports, but in some circumstances there is a saving of cost in routing the ore to the port nearest point of origin and that this might be true on a time charter arrangement or for an integrated shipper. The Commission then pointed out the approximate ocean distances from various points of origin to the Atlantic ports and also set out the figures which showed the amounts of Labrador ore received at Baltimore and at Philadelphia in the period from July 31 to December 5, 1954. The Commission, however, made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore. The Commission's figures as to the tonnage received at these two ports is limited to the period from July 31 to December 5, 1954, and no evidence was offered or considered as to the shipments during the year 1955 and 1956 preceding the date of the Commis-

sion's decision. The Commission did not pass on the testimony heretofore referred to in this opinion indicating that Labrador ore would seek the port offering the lowest cost of transportation from the point of origin to the destination in steel producing territory.

The Commission did not undertake to appraise the relative weight of the various factors entering in its decision, but Division 2 stated the following general conclusions with respect to the proposed rates from Philadelphia, New York and Boston:

> "The evidence in support of the proposed adjustment from Philadelphia is substantially stronger than that offered in behalf of the proposed rates from New York and Boston. We are convinced that, in view of the earnings that would be yielded by the suspended rates from Philadelphia, such rates are not below a minimum reasonable level. We are of the view further that establishment of the proposed rates from Philadelphia will not result in disrupting the existing port relationship on traffic generally to destinations in differential territory. As indicated, the rates on iron ore from Baltimore and Philadelphia to the Pittsburgh area have been on a parity for over 50 years without disturbing the port relationship on the other commodities, and no good reason appears why the extension of this parity to ore-consuming points beyond Pittsburgh should change this situation. The record is persuasive that the iron ore tonnage through Baltimore will probably continue to increase regardless of the movement through Philadelphia.
>
> "Moreover, in administering the provisions of the act the Commission is required to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. The evidence is certain that in the years to come a large proportion of the iron ore used in this country will originate in foreign countries. This iron ore is and will be an important factor in national defense. Es-

pecially in case of national emergency, it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port which could be incapacitated through congestion or other cause, and that, in the interest of national defense, Philadelphia and Baltimore be placed on a rate parity on imported iron ore as proposed in the schedules filed to become effective on February 19, 1953. Such a parity would not result in undue preference or prejudice."

Division 2 reached the ultimate conclusion that the proposed rates from Philadelphia to the differential territory were just and reasonable but that the rates from New York and Boston were not shown to be just and reasonable.

The general conclusions of the full Commission reaffirmed Division 2 with respect to rates from Philadelphia. They found that a substantial increase in iron ore imports would continue in that Labrador tonnage would increase to 10,000,000 tons in 1956 and to a greater extent in later years, and that the tonnage through Baltimore would probably continue to increase notwithstanding the maintenance of a parity rate with Philadelphia and also with New York. The Commission also reaffirmed the conclusions of Division 2 with respect to the necessity for parity in carrying out the national transportation policy. In this respect it said:

"As stated in the prior report, we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its full share of the transportation burden, but it is of vital importance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports.

These matters, among others of record, have been given consideration in reaching our conclusions herein."

New York and Boston rates:

The railroads serving New York and Boston pointed out the importance of being allowed to share in the new traffic based upon the importation of iron ore so as to replace the large revenues now received from domestic iron ore moving eastward from the Minnesota-Michigan ranges. The railroads also stressed the fact that business interests could not be expected to invest capital in constructing unloading facilities at New York or Boston unless parity of rates was established with Baltimore and Philadelphia, enabling the more northerly ports to share in the business; and they also emphasized the importance of having one or more ports available to handle the new importations.

Division 2 of the Commission, however, pointed out the greater distances from New York and Boston to the differential territory and resulting in the smaller earnings at these ports under parity of rates. It said:

"• • • From New York and Boston to the 7 destinations in the Youngstown area, the short-line distances average 487 and 642 miles, respectively, whereas to the same destinations the short-line distances average 424 miles from Philadelphia and 380 miles from Baltimore. The average short-line distance from Philadelphia exceeds that from Baltimore by only 11.6 percent whereas the like distances from New York and Boston are greater by 28 and 70 percent, respectively, than the distance from Baltimore.

"The proposed rates from Philadephia compare favorably with rates applicable on iron ore from and to points in central and truckline territories and thus come within the 'zone of reasonableness' to which reference is made in *New York Central R. Co.* v. *United States, supra.* The proposed rates from New York and Boston would produce substantially lower revenues from those from Philadelphia. Moreover, the record

shows that the facilities at New York and Boston are not adequate for the unloading of iron ore in substantial lots, and there is no positive indication that adequate facilities would be constructed thereat or that any substantial movement through those ports under the proposed rates could be expected. We conclude that, in the circumstances, the proponents of the proposed rates from New York and Boston have not sustained the statutory burden placed upon them to prove that these rates are just and reasonable."

Subsequent to the decision of Division 2 additional testimony was taken in which witnesses for the Boston and Maine and the New York, New Haven and Hartford indicated that unloading facilities would be established at Boston if equal rates with Baltimore were permitted, and similar representations as to the establishment of facilities at New York were made by persons interested in the development of that port. It was however made clear by all of the witnesses that facilities would not be established without assurances of parity of rates.

The Commission then made a comparison of revenues from the four north Atlantic ports to destinations in the Youngstown area. In one computation, using short-line distances, the following tabulation was made of the car-mile and ton-mile revenues on an average load of 62 gross tons and the rate from Baltimore of $3.035, which included the Ex-Parte No. 175 increase, i.e., a general increase applied by the Commission to all the rates:

From:	Short-Line Distances miles	Car-Mile cents	Ton-Mile mills
Baltimore	378	49.8	8.0
Philadelphia	424	44.4	7.2
New York	490	38.4	6.2
Boston	646	29.1	4.7

The Commission then considered certain cost studies submitted by the Erie Railroad for the single line haul from

New York to Youngstown and for the joint haul with other railroads from Boston, and stated the final conclusion:

> "We have carefully considered all of the evidence pertaining to the estimated out-of-pocket cost from New York and Boston. After restating the costs on the bases indicated, including the distribution of the costs of freight-train repairs, depreciation, and rentals of other than mileage cars over freight-train car-miles, loaded and empty, and the application of the unit cost to the loaded and empty car-miles of the imported ore traffic, we conclude that $2.647 and $3.42 would more nearly approximate the out-of-pocket costs per gross ton from New York and Boston, respectively. On these bases, the rate of $3.035 would exceed the cost from New York by 38.8 cents per gross ton, but would be 38.5 cents less than the cost from Boston."

On this basis the Commission found that the Baltimore rate would be just and reasonable as applied to New York, but would not be just and reasonable as applied to Boston.

The Commission also found that the $2.51 rate from Baltimore to Youngstown proposed by the Baltimore railroads as of February 16, 1953, would not be just and reasonable despite the fact that a comparison of the car-mile and ton-mile revenues via short line distances under the $2.71 rate (without the Ex-Parte No. 175 increase) from New York to Youngstown, with similar revenues under the $2.51 rate from Baltimore, shows that the latter would exceed the former. The comparison is shown by the following table:

To Youngstown, Ohio

From:	Rate	Car-Mile cents	Ton-Mile mills
Baltimore	$2.51	41.2	6.6
New York	2.71	34.3	5.5

In general, the Commission concluded that the natural advantages to which the Port of Baltimore would ordinarily

be entitled were outweighed by the need to maintain ports of entry for iron ore at Philadelphia and New York and that this should be accomplished by diverting traffic from Baltimore to the other ports to such an extent that the facilities already established at Philadelphia may be more extensively and profitably used, and so that New York would be encouraged to build facilities which it does not now possess.

[1] The weight to be given to the administrative findings of the Commission and the scope of the authority of the reviewing court are well established. The expert judgment of the Commission in respect to matters in the field committed to it by Congress must be recognized and its conclusions, if supported by substantial evidence on the whole record, must be accepted. The Court is not at liberty to substitute its judgment for that of the Commission. As was said in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547, 32 S.Ct. 108, 111, 56 L. Ed. 308:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have are made by *prima facie*, true, and this court has are made by law **prima facie**, true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois Central R. Co.* v. *I.C.C.*, 206 U.S. 441, 27 S.Ct. 700, 51 L.Ed. 1128. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

[2] The Commission is not required to make detailed findings of fact but must make the basis of its decision clear

so that the reviewing court may perform its function. The matter was well stated by Judge Magruder in *New York Cent. R. Co.* v. *United States*, D.C., 99 F. Supp. 394, 400, affirmed *Interstate Commerce Comm.* v. *New York Cent. R. Co.*, 342 U.S. 890, 72 S.Ct. 201, 96 L.Ed. 667:

> "In *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 1930, 282 U.S. 74, 86-87, 51 S. Ct. 1, 75 L. Ed. 221, the Supreme Court, while upholding a Commission order, took occasion to criticize the Commission for the unnecessary burden cast upon the reviewing court by failure of the Commission to include in its report a complete statement showing the grounds upon which its determinations rested. Just how far the Commission is obliged by statute to go in this particular is not so clear as it might be. The Commission does have the duty to set forth in its report the 'basic' or 'essential' or 'quasi-jurisdictional' findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree. *United States* v. *Chicago, M., St. P. & Pac. Railroad Co.*, 1935, 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023; *United States* v. *Baltimore & Ohio Railroad Co.*, 1935, 293 U.S. 454, 463, 55 S.Ct. 268, 79 L.Ed. 587; *Florida* v. *United States*, 1931, 282 U.S. 194, 215, 51 S. Ct. 119, 75 L. Ed. 291."

See also *United States* v. *Chicago, M., St. P & P. R. Co.*, 294 U.S. 499, 504-505, 55 S. Ct. 462, 79 L. Ed. 1023; *Eastern Central Motor Carriers Association* v. *United States*, 321 U.S. 194, 211-212, 64 S. Ct. 499, 88 L. Ed. 668; and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653, 74 S. Ct. 826, 98 L. Ed. 1015, where the failure of the Commission to explain adequately its departure from prior norms led to a remand of the case for more explicit findings.

The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador requires or justifies the striking down of the long established differential in favor of Baltimore in order to enable Philadelphia and New York

to have a share of the traffic and thereby insure their maintenance as ports of entry for the product.

The Commission in reaching its conclusions must of course give effect and adhere to the national transportation policy declared by Congress, which provides for the promotion of sound economic conditions among the several carriers and the establishment of reasonable charges for transportation services without unjust discrimination, undue preferences or advantages and without unfair or destructive competitive practices, to the end that a national transportation system may be built up, adequate to meet the needs of the commerce of the United States and of the Postal Service and of the national defense. See Preamble to 49 U.S.C.A. §§ 1, 301, 901 and 1001. However, in effecting this policy it is made unlawful for any carrier to give any undue or unreasonable preference to any person, locality or port, or to subject any person, locality or port to undue or unreasonable prejudice or disadvantage. 49 U.S.C.A. §3(1). The statute also provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carrier, proposing the rate to show that it is just and reasonable. 49 U.S.C.A. § 15.

[3] In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its conclusions and whether there was substantial evidence to support the findings. In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore. This ruling, moreover, has upset a railroad and Commission practice of many years duration in which the factor of distance was given effect. Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in

the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *State of New York* v. *United States*, 331 U.S. 284, 305, 67 S. Ct. 1207, 91 L. Ed. 1492; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524, 44 S. Ct. 189, 68 L. Ed. 417.

What are the findings upon which the Commission relies as the basis for its conclusion that there should be parity of rates between the ports notwithstanding the factor of distance? As to Philadelphia and Baltimore they seem to be:

> 1. That there is parity in respect of rates between Baltimore and Philadelphia as to other routes which involve differences in distance;
>
> 2. That in any event the difference in distance to the differential territory, measured from Philadelphia and Baltimore, is so insignificant that it should be disregarded, and
>
> 3. That the needs of the producers of steel and the requirements of the Postal Service and of the national defense make essential the maintenance of a plurality of ports for the importation of iron ore into the United States.

[4, 5] The propriety and sufficiency of these findings must be appraised against the historic background in which the differential in favor of Baltimore has been maintained. Undoubtedly it originated in the natural advantages derived from the shorter distance of the port to destinations in the west and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports not only by practical railroad men but by impartial governmental authority in control. This practical solution of the difficulties arising from competition was based on solid legal ground, for it is settled that the law does not attempt to equalize opportunities among localities

and that the natural advantage which belongs to a locality does not constitute a preference. *United States* v. *Illinois Cent. R. Co.*, 263, U.S. 515, 524, 44 C.Ct. 189, 68 L.Ed. 417; *State of New York* v. *United States*, 331 U.S. 284, 331-332, 67 S.Ct. 1207; *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216, 229, 71 S. Ct. 264, 95 L. Ed. 225. The Commission itself is without authority to adjust rates and differentials for the purpose of diverting traffic from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another. *Texas & Pacific R. Co.* v. *United States*, 289 U.S. 627, 639, 53 S.Ct. 768, 77 L. Ed. 1410.

[6] This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may not reduce its rates to meet competition within the zone of reasonableness, but differences in rates based upon differences in length of haul, density of traffic and other elements of the cost of service are within a long standing practice of rate making, and a rate may not be filed for the purpose of diverting traffic from one locality in order to build up another. *Texas & Pacific R. Co.* v. *United States*, 289 U.S. 627, 636, 639, 53 S. Ct. 768. Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *State of New York* v. *United States*, 331 U.S. 284, 297, 298, 67 S. Ct. 1207. The Commission in reaching its conclusion must consider all of these factors and may not condemn a difference in rates "unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Cent. R. Co.*, 263 U.S. 515, 524, 44 S.Ct. 189, 193.

In passing upon the merits of the case, the Commission gave no consideration to the cost or value of the services of the railroads competing for traffic at Philadelphia and Baltimore. No evidence on these points was offered or required; but the ultimate finding of the Commission as to distances from Philadelphia and Baltimore to Central terri-

tory was that the difference is so insignificant that the service from both ports is substantially identical. Evidence to support this finding seems to us to be lacking. Not only does the disparity, which had been considered substantial for many years, still exist, but the only standard of measurement proffered by the Commission for its finding was obviously incorrect. The Commission declared that the actual operating route from Philadelphia to Central territory is only 11 miles greater than the operating route from Baltimore. This seems convincing until it appears, from a careful reading of the decision, that the Commission is comparing the distance via the Pennsylvania from Baltimore with the distance via the Pennsylvania from Philadelphia and that in doing so it measures the distance from Philadelphia over a direct route, but measures the distance from Baltimore over a circuitous line through Perryville, which the railroad company adopts for its own convenience. Clearly this treatment was wrong. The comparison should be made on the same basis in each instance, for example, between the short line distances or between the short tariff distances from both ports, which shows a difference of 47 miles in the one case and 24 miles in the other. It is fair to say that the Commission, contrary to its former policy, either gave no weight whatever to the factor of distance or found that it was overborne by the general policy of supplying the needs of national commerce and the requirements of national defense.

We do not overlook the existence of parity of rates despite disparity of distances in respect to other commodities over other routes to which the Commission referred in its decision, seemingly as precedent for its present action. There was nothing new in this situation. These other rates had long existed but in spite of them the differential in favor of Baltimore on traffic moving to the Central territory had been maintained and carriers serving the port in reliance upon it had adjusted their rates and provided and maintained adequate facilities. We think that these

other rates furnish no reasonable basis for change of view on the part of the Commission.

It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system. How far the Commission's authority extends in this direction is an interesting and important question. The respondents stress the passage of the Act of September 18, 1940, 54 Stat. 899, whereby the Act to regulate commerce was amended to include the introductory declaration of the national transportation policy. This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the enforcement of all the provisions of the statute.[10] No one suggests, however, that the Commission has general authority to build up the transportation system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

[7] For our purposes it is enough to determine whether there is substantial evidence to support the finding that a radical change in the rates was needed to support the na-

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[10] *Luckenbach S.S. Co.* v. *United States*, D.C., 122 F. Supp. 824, affirmed 347 U.S. 984, 74 S. Ct. 850, 98 L. Ed. 1120; *Atlanta & St. Andrew's Bay Ry. Co.* v. *United States*, D.C., 104 F. Supp. 193; *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 576, 72 S. Ct. 985, 96 L. Ed. 1142; *Pacific Inland Tariff Bureau* v. *United States*, D.C., 129 F. Supp. 472.

tional policy. In the first place, it is to be noted that there is no evidence of financial weakness on the part of the railroads involved as has led the Commission in some cases to fix rates in aid of the financial necessities of certain carriers. See New England Divisions cases [*Akron, C. & Y. R. Co.* v. *United States.*], 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605. The decision of the Commission is based on the general conclusion that the northerly ports will have no share in the transportation of imported iron ore so long as the differential exists because ocean freights have been generally equalized since 1920 and the ore will inevitably be shipped to the port which enjoys the cheapest railroad rate to the interior.

Definite findings are made as to the ocean distances from major sources of iron ore to the north Atlantic ports, which show the distances from Labrador to be 950 miles to Boston, 1,187 miles to New York, 1,320 miles to Philadelphia and 1,470 miles to Baltimore; and it is said that a round trip between Labrador and Baltimore requires about three more days than a round trip between Labrador and Boston. The Commission, however, does not attempt to review the considerable body of testimony bearing on the relative costs of ocean travel to the several destinations. A witness is quoted as saying that at the present time iron ore from foreign ports moves both in vessels owned by the steel companies and in chartered vessels; that charter agreements may be voyage charters or time charters; that the ocean rates of voyage charters are equalized to all North American ports; but that in some instances there is a cost saving in routing ore to the nearest port "on a time charter or for an integrated shipper."

These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore. There was direct testimony that water costs bear a direct relationship to the time spent in transit; that the investments in large ore carrying vessels and operating costs are high, ranging from $1,000 to

$2,000 per day; that the shipping season from Labrador is short and that time consumed in making round trips is an important element in moving the maximum tonnage to the destination; that vessels under a time charter and vessels owned by the steel companies would be routed to the nearest port, all other factors being equal; and that the ownership of vessels by the steel companies is expanding. The weight of all this testimony tends strongly to support the view that ocean costs will be an influential if not a determining factor in selecting the ports of destinations, which basis is lacking for the general conclusion of the Commission that without parity of rates Philadelphia will have no share in the traffic. On the contrary, shipments during a few months in 1954, the only period considered, indicate that under parity the ore will go to Philadelphia rather than to Baltimore, since Philadelphia enjoys the double advantage of smaller ocean costs and most modern unloading facilities.

In the absence of specific findings, it does not seem reasonable to destroy a long established differential on the strength of which the railroads serving Baltimore have made large investments and the commercial interest of the port have made their arrangements. Obviously it is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to greatly increase. The port will still be entitled to the benefits of its geographical position, and the expected profits of the new business may not be diverted merely to satisfy the desire of other ports to share therein.

We think, however, that the record furnishes a reasonable basis for the decision of the Commission to retain parity of rates between Baltimore and Philadelphia in respect to traffic to Pittsburgh. Similar reasons for the maintenance of the status quo apply as in the case of Baltimore. It is true that, so far as iron ore is concerned, only a paper rate was involved until recently; nevertheless, parity has existed

for more than 50 years with the acquiescence of Baltimore, and it was retained without objection in the revision of rates in 1950 when the rate of imported iron ore from Philadelphia to the Pittsburgh area was reduced by the same amount as the rate from Baltimore. While there had been no significant movement of iron ore from Philadelphia to the steel mills in the Pittsburgh area during this period, there was, as the report of Division 2 of the Commission shows, a substantial movement from Baltimore to this district. The Pennsylvania Railroad announced its intention, in August 1951, to erect a modern unloading facility in South Philadelphia with the obvious purpose to share in this traffic and in its expected increase, but no objection to the existing parity of rates came from the Baltimore railroads until they made their tactical move in 1953 in order to preserve the consistency of their position.[11] In our opinion, it is of great significance that Philadelphia interests have made a large capital investment in providing unloading facilities in the belief that the historic situation would be retained; and it would be unreasonable at this time to deny them the opportunity to make use of the structure which they have set up.

The lack of substantial basis for the allowance of parity to the Port of New York is shown by what has already been said; but it may be added that the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to consid-

[11] The respondent railroads contend that parity as to Pittsburgh is inconsistent with the differential as to the Central territory, pointing out that Youngstown, one of the points in that territory, is 66 miles distant from Pittsburgh over the Pennsylvania Railroad as compared to 76 miles over the Baltimore & Ohio. This incongruity, however, does not present a new element for it has existed throughout the history of the differential and, in any event, we are concerned not with the comparative distances from Pittsburgh but with comparative distances from the ports of Philadelphia and Baltimore.

erations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs by 38.8 cents per ton. For this reason alone the rate was found to be just and reasonable; and yet in the same opinion the Commission found that the rate of $2.51 from Baltimore, proposed by the Baltimore railroads to take effect February 16, 1953, that is to say, 20 cents under the current rate, would not be just and reasonable, although the evidence shows that the return thereon would exceed the return on the New York rate which the Commission approved. As the four dissenting commissioners point out, the only justification in the record for the proposed rates from New York "is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore."

We conclude (1) that the orders of the Commission should be affirmed insofar as they disapprove the schedules filed to become effective on February 16, 1953, proposing reduced rates from Baltimore to the Pittsburgh and Central areas, and the schedules filed to become effective on February 16, 1953 and March 11, 1953 from Philadelphia to the Pittsburgh and Central areas, respectively; and (2) that the orders be vacated insofar as they approved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined; and (3) that, insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19,

1954, when parity went into effect; and (4) that, pending said findings and a decision based thereon, parity between the ports of Philadelphia and Baltimore be retained upon the assumption that steps be taken to secure a prompt determination.

The orders of the Commission are modified and the case is remanded to the Commission for further proceedings consistent with this opinion.

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND

Civil Action No. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, CANTON RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY, BALTIMORE ASSOCIATION OF COMMERCE, THE BALTIMORE CHAMBER OF COMMERCE, THE STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC., BALTIMORE CUSTOM HOUSE BROKERS AND FORWARDERS ASSOCIATION, THE MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE PENNSYLVANIA RAILROAD COMPANY, AND C. W. BOIN, AGENT, AND THE NEW YORK CENTRAL RAILROAD COMPANY AND ERIE RAILROAD COMPANY, *Defendants*.

Decree

This 22nd day of May, 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore From Eastern Ports to Central Freight Associa-*

tion Points, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed; To Wit, it is:

ORDERED, ADJUDGED AND DECREED

1. That the order of the Interstate Commerce Commission dated October 1, 1956 is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorized the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956 enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956 insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953 is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953 be permitted to remain

in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953 and March 11, 1953.

MORRIS A. SOPER
United States Circuit Judge
W. CALVIN CHESNUT
United States District Judge
R. DORSEY WATKINS
United States District Judge

TRUE COPY TEST:
WILFRED W. BUTSCHKY
Clerk

By WESLEY L. BOOZE, JR.
Deputy Clerk

APPENDIX C

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of October, A. D. 1956.

INVESTIGATION AND SUSPENSION DOCKET No. 6074

IRON ORE FROM EASTERN PORTS TO CENTRAL FREIGHT ASSOCIATION POINTS

It appearing, That on February 5, 1954, division 2 made and filed its report in the above-entitled proceeding, 291

I.C.C. 527, and found the schedules filed to become effective on February 9, 1953, proposing reduced rates on iron ore, in carloads, from Philadelphia, Pa., to destinations in the Wheeling, W. Va., and Steubenville and Youngstown, Ohio, areas just and reasonable, but found the other schedules not shown to be just and reasonable and ordered them canceled, and also denied fourth-section application No. 27721 filed in connection with certain of the rates;

It further appearing, That the Commission, on July 30, 1954, reopened the proceedings for further hearing;

It further appearing, That by order dated October 11, 1954, we entered upon a hearing concerning the lawfulness of additional schedules as enumerated therein filed by other carriers proposing reduced rates on iron ore, in carloads, from Boston, Mass., to destinations in the Youngstown area, and suspended the operation of said schedules until May 21, 1955, and that the respondents have postponed the operation thereof indefinitely;

And it further appearing, That a full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed a report on further hearing; which report and the aforesaid report of February 5, 1954, are hereby referred to and made a part hereof;

It is ordered, That the order of division 2 entered herein on February 5, 1954, be, and it is hereby, vacated and set aside, and that the respondents herein be, and they are hereby, notified and required to cancel the schedules found not shown to be just and reasonable in the said report on further hearing, on or before October 29, 1956, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

FOURTH SECTION ORDER No. 18483

IRON ORE—BALTIMORE, MD., TO DONORA AND MONESSEN, PA.

By Fourth Section Application No. 27721, filed by Agent C. W. Boin for and on behalf of The Baltimore and Ohio Railroad Company and The Pittsburgh and West Virginia Railway Company, authority is sought to establish and maintain rates on iron ore, in carloads, from Baltimore, Md., and points taking the same rates, to Donora (Baird) and Monessen, Pa., over routes as described therein, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act. A hearing having been held and full investigation having been made, and the Commission, on the date hereof, having made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report and application are hereby referred to and made a part hereof;

It is ordered, That the said application be, and it is hereby, denied.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D

Statutes Involved

The National Transportation Policy, 49 U.S.C. preceding § 1.

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to

encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Interstate Commerce Act:

Section 1(5), 49 U.S.C. 1(5)

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1), 49 U.S.C. 3(1)

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference, or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disavantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 14(1), 49 U.S.C. 14(1)

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 15(1), 49 U.S.C. 15(1)

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint-rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed,

as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(7), 49 U.S.C. 15(7).

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the

interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed change rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 15a(2), 47 U.S.C. 15a(2)

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

APPENDIX E

RATES PER GROSS TON PROPOSED ON IRON ORE, PUBLISHED TO BECOME EFFECTIVE ON FEBRUARY 9, 1953, FROM PHILADELPHIA TO THE WHEELING-STEUBENVILLE-YOUNGSTOWN AREA WHICH, AFTER APPROVAL BY THE I.C.C., BECAME EFFECTIVE ON FEBRUARY 19, 1954.

Destinations	Rates Per Gross Ton
Midland, Pa.	$2.61
Benwood, W. Va.	2.66
East Steubenville, W. Va.	2.66
Follansbee, W. Va.	2.66
Martins Ferry, Ohio	2.66
Mingo Jct., Ohio	2.66
Steubenville, Ohio	2.66
Weirton, W. Va.	2.66
Wheeling, W. Va.	2.66
Farrell, Pa.	2.71
Lowellville, Ohio	2.71
Niles, Ohio	2.71
Sharon, Pa.	2.71
Sharpsville, Pa.	2.71
Struthers, Ohio	2.71
Warren, Ohio	2.71
Youngstown, Ohio	2.71

Source: Exhibit 86, Column (3); Tr. 1165.

No. 467

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ARMCO STEEL CORPORATION, M. A. HANNA COMPANY, IRON ORE COMPANY OF CANADA, NATIONAL STEEL CORPORATION (WEIRTON STEEL COMPANY DIVISION), REPUBLIC STEEL CORPORATION, WHEELING STEEL CORPORATION, AND THE YOUNGSTOWN SHEET AND TUBE COMPANY, *Appellants,*

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Maryland

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BRIEF ON BEHALF OF ARMCO STEEL CORPORATION, ET AL. IN OPPOSITION TO MOTIONS TO AFFIRM

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November 5, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 467

ARMCO STEEL CORPORATION, ET AL., *Appellants*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Maryland

---

BRIEF ON BEHALF OF ARMCO STEEL CORPORATION, ET AL. IN OPPOSITION TO MOTIONS TO AFFIRM

At pages 10 to 21 of the Jurisdictional Statement filed in behalf of Armco Steel Corporation, et al., these Appellants have demonstrated that the four questions presented are so substantial as to require plenary consideration by the Court, with briefs on the merits and oral argument, for their resolution. Accordingly this Brief will not reiterate the argument there made and will be confined to certain points upon which additional comment is warranted.

OVERSIMPLIFICATION OF THE CASE BY MOVANTS

The record before the I.C.C. revealed that iron ore in recent years has been imported in ever increasing quantities from several foreign origins. These include Venezuela, Chile, Liberia, Brazil, Sweden, Cuba and Labrador. In its two decisions the Interstate Commerce Commission gave consideration to this and the facts relating thereto. *Iron Ore From Eastern Ports to C.F.A. Points,* 291 I.C.C. 527, 529; 299 I.C.C. 195, 197, 198, 200, 202-203.

The movants indicate their belief that the Interstate Commerce Commission should have limited its considerations, for all practical purposes, solely to iron ore from Labrador. (B. & O.—W. Md. motion, pp. 3-5, 9-10, 19, 21-22, 28; Canton motion, pp. 4-7; Md. Port Auth.-Balt. Assn. Comm. motion, pp. 5, 8, 9)

It is submitted that the theory of these movants is patently incomplete. That they conceive this to be self-serving is no basis for denying the right and the obligation of the I.C.C. to reach its findings and conclusions based upon the whole record. See *Administrative Procedure Act,* 5 U.S.C. 1009(e).

ERRONEOUS THEORY OF MOVANTS AS TO ADEQUACY OF FINDINGS BY THE I.C.C.

The actual rates subject to the jurisdiction and control of the Interstate Commerce Commission [for purposes of this appeal]* are those relating to the

* The appeal of Armco Steel Corporation, et al., is specifically directed against that segment of the decision, judgment, order and decree of the Court below, pertaining to the issue of iron ore railroad rate parity to the Wheeling-Steubenville-Youngstown area from Philadelphia and Baltimore.

transportation by railroad of imported iron ore from the eastern seaboard ports of Baltimore and Philadelphia to Youngstown, Ohio and the other sixteen destinations located in the Wheeling-Steubenville-Youngstown area. Those were the railroad freight rates which were the subject of the I.C.C. suspension and investigation order.

This Court has long recognized the breadth of discretion vested in the Interstate Commerce Commission in carrying out its duties under the Interstate Commerce Act when passing on the lawfulness of rates subject to its jurisdiction. *Board of Trade* v. *United States,* 314 U.S. 534, 546 (1952); *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592, 593 (1949).

It is not our position that the I.C.C. may not give consideration to matters outside its specific statutory jurisdiction. However, we submit that under the theory of the Court below and movants here factors *outside the jurisdiction and control of the I.C.C.* would be the dominant factors. We refer to the wholly disproportionate emphasis they have placed upon "relative costs of ocean shipping." (B. & O.-W. Md. motion, pp. 11, 19, 20; Canton motion, p. 8; Md. Port Auth.-Balt. Assn. Comm. motion, p. 8) See *Baltimore and Ohio Railroad Company* v. *United States,* 151 F. Supp. 258, 278. The Interstate Commerce Commission has no jurisdiction or control over costs of ocean shipping, whatever they may be, to the eastern seaboard of the United States from Venezuela, Chile, Liberia, Brazil, Sweden, Cuba or Labrador.

As revealed in the report of the I.C.C. attacked in the Court below, relative distances from these various foreign sources of iron ore, and factors bearing upon

the use of voyage charter vessels, time charter vessels, or private vessels were given consideration by the I.C.C. and reflected in its preliminary and ultimate findings. *Iron Ore from Eastern Ports to C.F.A. Points,* 299 I.C.C. 195, 198, 202.

It is submitted that the I.C.C. entirely met its responsibilities in evaluating the evidence bearing on these factors in conjunction with the primary evidence in the whole record bearing directly upon matters clearly within I.C.C. jurisdiction and control. In any event, the extent to which a reviewing Court may require the I.C.C. to refine and elaborate its findings on matters *outside the Commission's jurisdiction and control* presents a most substantial question requiring plenary consideration by this Court with briefs on the merits and oral argument.

SERIOUS INCONSISTENCY OF MOVANTS AND OF THE COURT BELOW ON THE FACTOR OF OVERLAND DISTANCE AND RELATIVE OCEAN SHIPPING COSTS

Great emphasis is laid by these movants, and by the Court below, on the comparative overland distance by rail from Baltimore and Philadelphia to the seventeen ore-consuming points in the Wheeling-Steubenville-Youngstown area. (B. & O.-W. Md. motion, pp. 13-16; Canton motion, pp. 6, 9-10; Md. Port Auth.-Balt. Assn. Comm. motion, p. 7) See *Baltimore & Ohio Railroad Company* v. *United States, supra,* p. 274.

The Court below at page 277 completely disregards the differences in overland distances from the same ports to the Pittsburgh District in upholding the lawfulness of iron ore rate parity from Baltimore, and Philadelphia to ore consumers and steel producers

there located who are in vigorous competition with these Appellants located in the Wheeling-Steubenville-Youngstown area. "Relative costs of ocean shipping" apparently give neither the Court below nor these movants the slightest concern with respect to Pittsburgh, but they conceive such costs to be of paramount and decisive importance with respect to Youngstown, Ohio and the other sixteen points just to the west of Pittsburgh.

Again we submit that, at the very least, such a position presents a substantial question warranting plenary consideration by this Court with briefs on the merits and oral argument.

ERRONEOUS LEGAL THEORIES OF MOVANTS

The iron ore rates from Philadelphia to the Wheeling-Steubenville-Youngstown area, published to become effective February 9, 1953, have been upheld unanimously both by I.C.C. Division 2 in the initial decision below and by all ten participating Commissioners in the final decision below. The rates have been in effect since February 19, 1954. Under Section 15(7) of the Interstate Commerce Act the publishing railroad, the Pennsylvania, had ". . . the burden of proof to show that the proposed changed rate . . . is just and reasonable." The Commission properly found that statutory burden has been met as to the rates from Philadelphia published to become effective February 9, 1953.

The theory advanced by the B. & O.-Western Md. interests with respect to Section 1(5) of the Interstate Commerce Act [49 U.S.C. 1(5)], treated in their footnote at page 26 is, we submit, not supported by the cases there cited. Those relate to competitive rates

between (1) I.C.C. regulated *rail carriers* on the one hand and (2) I.C.C. regulated *barge and/or truck carriers* on the other, and set forth principles bearing on *different* modes of transportation not involved here.

The I.C.C. specifically found that the Baltimore carriers offered little, if any, evidence to justify the 20-cent reduction under the Philadelphia rate to Youngstown, etc. filed to become effective February 19, 1954. *Iron Ore From Eastern Ports to C.F.A. Points,* 299 I.C.C. 195, 209. By no stretch of the imagination did the Baltimore lines submit any substantial evidence on this point. See *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 229 (1938).

With respect to the discussion by the railroad movants of Section 3(1) of the Interstate Commerce Act [49 U.S.C. 3(1)] they neglect to mention the following specific language of that statute:

> "Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic *of any other carrier of whatever description.*" (italics added)*

Thus, the railroad movants do not themselves as carriers have any standing to complain under Section 3(1) of the Act.

The motion of the Canton Railroad Company at bottom appears to be a diatribe of frustration directed by a disappointed litigant at the Interstate Commerce Commission. (See pages 2, 3, 4, 7, 8) The glittering generalities expressed are not supported by legal au-

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* See *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.,* 248 I.C.C. 109, 119 (1941).

thorities (including the single instance at page 11 where a decision cited by Appellants is mentioned) nor by specific references to the record or the I.C.C. decisions it has attacked.

At pages 3, 11, 12 this movant, by implication, would leave the impression that the Interstate Commerce Commission considered only domestic iron ore rates in reaching its ultimate findings. Consideration of the domestic iron ore rate structure was entirely proper. The Commission, revealing the completeness of its analysis, also carefully considered the import rates on imported iron ore from various ports to other inland consuming points. *Iron Ore From Eastern Ports to C.F.A. Points*, 291 I.C.C. 527, 537-538. At page 537 it found:

> "... The $2.71 rate [on imported iron ore] from Baltimore to Buffalo applies over the direct route of the Baltimore & Ohio, 592 miles, *which is 190 miles longer* than the haul of 402 miles from and to these points over the direct route of the Pennsylvania. The Western Maryland also participates in the $2.71 rate from Baltimore to Buffalo over a route through Youngstown, a distance of 567 miles, or *165 miles longer* than the haul over the direct route of the Pennsylvania." (italics added)

When the Baltimore interests are benefited the factor of comparative overland distance appears to lose its sacrosanct character so far as they are concerned.

All the foregoing is mentioned to demonstrate that the over-simplification indulged in by movants destroys the validity of their contention. Contrary to their position, it is clear that substantial questions are

presented herein to this Court of such a nature as to require its plenary consideration after briefs and oral argument.

FAILURE OF MOVANTS TO DISCUSS TWO OF THE QUESTIONS RAISED BY THESE APPELLANTS

Questions numbered 3 and 4 raised by these Appellants at pages 3 and 4 of their Jurisdictional Statement present two aspects of what is the most fundamental issue here before this Court. Yet movants never really face up to this issue in their motions to affirm. This basic issue is whether the reviewing Court by its order of remand respecting the iron ore rates from Baltimore and Philadelphia to the Wheeling-Steubenville-Youngstown area, considering the whole record, unlawfully substituted its judgment for that of the Interstate Commerce Commission in a sphere of railroad rate regulation exclusively reserved by the Congress to the I.C.C.

Appellants submit that this is precisely what occurred. Thus there is directly presented the question of when the reviewing Court, by the device of asserting allegedly inadequate findings, can in practical effect substitute its judgment for that of the Interstate Commerce Commission on the issue of the reasonableness and lawfulness of railroad freight rates thereby causing uncertainty and continuing litigation in lieu of a decision determining the issues as to these rates by the agency so empowered by the Congress.

If decisions of this Court, such as *Board of Trade v. United States*, and *Ayrshire Collieries Corp. v. United States, supra*, are not to be robbed of real meaning the questions raised by these Appellants should be answered. They should be answered in this pro-

ceeding by this Court after plenary consideration within the meaning of Rule 15(2)(f). The answers to these questions are of paramount importance to the proper administration of the Interstate Commerce Act and to those directly affected thereby such as these Appellants.

CONCLUSION

For the reasons stated both herein and in the Jurisdictional Statement previously filed by these Appellants, it is submitted that the questions presented by this appeal are so substantial as to require plenary consideration by the Supreme Court of the United States, with briefs on the merits and oral argument, for their resolution. We therefore pray that the motions to affirm be denied, that jurisdiction be noted and that the order, judgment and decree of the court below be reversed in respect to the issues and questions raised by this appeal.

Dated at Washington, D. C. this 5th day of November, 1957.

Respectfully submitted,

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National Steel Corporation (Weirton Steel Company Division),
Republic Steel Corporation,
Wheeling Steel Corporation,
The Youngstown Sheet and Tube Company, Appellants.

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FILED
SEP 16 1957
JOHN T. FEY, Clerk

No. 468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

DELAWARE RIVER PORT AUTHORITY, CITY OF PHILADELPHIA, CHAMBER OF COMMERCE OF GREATER PHILADELPHIA, *Appellants,*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

DELAWARE RIVER PORT AUTHORITY, CITY OF PHILADELPHIA, CHAMBER OF COMMERCE OF GREATER PHILADELPHIA, *Appellants,*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Maryland

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JURISDICTIONAL STATEMENT

In compliance with Rule 13 of the Rules of the Supreme Court of the United States appellants, Delaware River Port Authority, City of Philadelphia and Chamber of Commerce of Greater Philadelphia submit herewith their statement disclosing the basis on which the Supreme Court of the United

States has jurisdiction on appeal to review the final decree of the District Court entered in this cause on May 22, 1957. Notices of appeal were filed in the District Court July 19, 1957. A substantial question is presented by these appeals.

OPINION BELOW

The opinion of the United States District Court for the District of Maryland is reported at 151 Fed. Supp. 258. A copy is attached hereto as Appendix A. A copy of the Decree of the District Court entered May 22, 1957 is attached as Appendix B. The opinions of the Interstate Commerce Commission are reported as *Iron Ore from Eastern Ports to C.F.A. Points*, 291 I.C.C. 527 and 299 I.C.C. 195.

JURISDICTION

These actions were brought under 28 U.S.C. § 1336, to set aside, in part, an order of the Interstate Commerce Commission. The judgment of the District Court was entered on May 22, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *Virginian Ry. Co.* v. *United States*, 272 U.S. 658; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125; *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216.

QUESTIONS PRESENTED

1. Whether the court erred in holding that the order of the Interstate Commerce Commission insofar as it approves the tariff schedules of the Pennsylvania Railroad on iron ore from Philadelphia to Central terri-

tory, is not supported by essential basic findings and in remanding the proceeding to the Commission to make more explicit findings and for further proceedings consistent with the opinion of the court.

2. Whether the court erred in interpreting and in applying to the evidence of this case the provisions of the National Transportation Policy (49 U.S.C. preceding §§ 1, 301, 901, 1001) and of Sections 1(5), 3(1) and 15a(2) of the Interstate Commerce Act (49 U.S.C. §§ 1(5), 3(1) and 15a(2)).

3. Whether the court erred in failing to adhere to the doctrines of primary jurisdiction and administrative finality by remanding to the Interstate Commerce Commission its order aforesaid for further proceedings consistent with the court's opinion, thereby exceeding its authority and usurping the administrative function delegated to the Commission by the Congress.

STATUTES INVOLVED

The National Transportation Policy and Sections 1(5), 3(1), 14(1), 15(1), 15(7) and 15a(2) of the Interstate Commerce Act, as amended, are set forth in Appendix C hereto.

STATEMENT

By unanimous action the Interstate Commerce Commission in its decision and order of October 1, 1956, aforesaid, found, in part, just, reasonable and otherwise lawful tariff schedules wherein the Pennsylvania Railroad Company, effective February 9, 1953, published freight rates on import iron ore from Philadelphia, Pa., to certain points in Central territory west of Pittsburgh, Pa., on the same level as rates already maintained on the traffic from Baltimore, Md.

Previously, in its order of February 5, 1954, Division 2 of the Commission had made a similar finding, reported at 291 I.C.C. 527. For at least fifty years past, rates on import iron ore to the Pittsburgh district had been the same from Philadelphia as from Baltimore.

The Commission also held in its decision and order of October 1, 1956, with four dissents, that rates on import iron ore from New York, N. Y., to certain destinations in Central territory, published on the Baltimore basis, were just, reasonable and lawful but that rates from Boston, Mass., on the same basis had not been shown to be just, reasonable, and lawful. The Commission held further that certain later retaliatory efforts by the railroads serving Baltimore and Philadelphia to reduce their rates on iron ore from those ports to the interior were not shown to be just and reasonable. In essence, therefore, the order of the Commission approved as reasonable rates on import iron ore from Philadelphia and New York the same as those applicable from Baltimore, but disapproved rates on the same basis from Boston.

The court below, in its decree entered May 22, 1957, vacated the Commission's order of October 1, 1956, insofar as it approved the tariff schedule on iron ore from New York, and ordered the Commission to require the railroads serving New York to cancel the rates at issue. The court below also held that the order of the Commission insofar as it approved the tariff schedules of the Pennsylvania Railroad from Philadelphia, effective February 9, 1953 is not supported by essential basic findings, and remanded the case to the Commission to make explicit findings, (a) as to the relative costs of ocean shipping of imported iron ore to the

ports of Baltimore and Philadelphia, and (b) as to the traffic therein to be reasonably expected at those ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through those ports since February 19, 1954, when parity went into effect. These appellants have appealed only from that portion of the court's decree which remands to the Commission its order approving rates from Philadelphia the same as those from Baltimore.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The District court, contrary to the well settled law on the point, has failed to adhere to the doctrines of primary jurisdiction and administrative finality in remanding the proceeding to the Interstate Commerce Commission. It has sought to substitute its judgment for that of the Commission, and to consider the wisdom and expediency of the Commission's decision and whether, on like evidence, it would have made a similar ruling. This is contrary to the doctrine of *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U.S. 541, 547. The court has proceeded upon the assumption that the difference in rail distances to the considered destinations, Philadelphia versus Baltimore, was the basic reason for the pre-existing differential in the rates on iron ore. That is contrary to the evidence before the Commission. Throughout its opinion the court has criticized the Commission for its alleged departure from prior "norms" in approving parity rates from Philadelphia. Even if prior norms had been departed from by the Commission, which is denied, that fact does not warrant reversal or remand by the court. As stated in *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, at 665-66:

"This court has no concern with * * * the alleged inconsistency (by the Interstate Commerce Commission) with findings made in other proceedings before it." The entire Commission, after considering at length all of the evidence, found that the establishment and maintenance of rates on import iron ore from Philadelphia to interior points on the Baltimore basis is in accordance with the provisions of the Interstate Commerce Act. The District court has, as will be shown hereinafter, misapplied and misinterpreted the evidence before the Commission, and has remanded the case to the Commission based upon its own construction of the evidence and upon its own interpretation of prior Commission decisions. Clearly the court has exceeded its lawful functions.

2. The District court has erred in its application and interpretation of the provisions of the Interstate Commerce Act and of the National Transportation Policy.

Although a specific finding was not made, it is clear that in the court's opinion the maintenance by the Pennsylvania Railroad of rates on import iron ore from Philadelphia to interior destinations the same as rates applicable from Baltimore constitutes undue preference of Philadelphia and undue prejudice to Baltimore, contrary to the provisions of Section 3(1) of the Interstate Commerce Act. In view of the findings of the Commission, among others, that by short tariff routes the railroad distance from Philadelphia to Youngstown, Ohio, a representative destination point, is but 47 miles greater than from Baltimore, and that by the actual routes of movement of the Pennsylvania Railroad from both ports, but 11 miles greater, manifestly the maintenance of rates from Philadelphia

on the Baltimore basis does not, as the Commission specifically found (291 I.C.C. 527, 554), constitute undue preference of the Port of Philadelphia or undue prejudice to the Port of Baltimore. To the contrary, the *failure* of the Pennsylvania Railroad to maintain parity rates from those ports could well be held in the circumstances to violate Section 3(1) of the Interstate Commerce Act.

Moreover, the court has erred in failing to accept or give weight to the Commission's finding that the iron ore rate from Philadelphia at issue is just and reasonable, under Section 1(5) of the Act. The Commission's finding in that regard was based, in part, upon the widely accepted criteria of comparisons with other rates on similar traffic, and comparisons with the earnings derived from similar movements of traffic. The court states in its opinion that the Commission has given no consideration to the cost or value of the services of the railroads competing for traffic at Philadelphia and Baltimore. Although no specific findings were made, or indeed were required, with respect to the relative costs of the services from Philadelphia and Baltimore, it is incorrect to state that no consideration was given to the relative cost factor. Moreover, the Commission's finding that the difference in rail distance to the destination points, from Philadelphia as opposed to Baltimore, is of small degree in and of itself constitutes a finding regarding relative costs of operation and relative values of service from the respective ports.

Of the greatest importance is the failure of the District Court correctly to apply, interpret and weigh the National Transportation Policy in con-

nection with the issues presented. That policy by its terms has as its purpose the administration by the Commission of the Interstate Commerce Act to the end of developing and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Division 2 of the Commission found in its decision of February 5, 1954, (a) that iron ore is and will be an important factor in national defense; (b) that especially in case of national emergency it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port, which could be incapacitated through congestion or other cause; (c) that "in the interest of national defense, Philadelphia and Baltimore (should) be placed on a rate parity on imported iron ore * * *." (291 I.C.C. 527, 554) The finding that the National Transportation Policy requires a parity of iron ore rates, Philadelphia with Baltimore, was affirmed by the entire Commission in its decision of October 1, 1956 (299 I.C.C. 195, 209). The Court does not state, or infer, that the National Transportation Policy and the national defense do not require the availability of two Atlantic ports as gateways for the importation of iron ore. Rather it appears to consider that other factors, such as the effect of Philadelphia rate parity on the Port of Baltimore and the railroads serving it, are more important considerations. In failing to consider the mandate of Congress contained in the National Transportation Policy, and in refusing to accept the Commission's findng that a parity of import iron ore rates, Philadelphia with Baltimore, is in accordance with that policy, the court has

seriously erred. *Luckenbach S. S. Co.* v. *United States,* 122 F. Supp. 824, aff. 347 U.S. 984.

3. The Commission, with ample support in the record before it, found that with rate parity, Philadelphia with Baltimore, import iron ore would move through both ports, and that in fact the tonnage through Baltimore would probably continue to increase at parity rates. That finding was based in part upon actual tonnage statistics in the period from the date of the effectuation of the parity, in February, 1954, through November of that year. In the first eleven months of 1954 the iron ore tonnage through Baltimore to the considered destinations west of Pittsburgh had increased to 1,070,457 gross tons, from 807,875 gross tons in the same period of 1953. To the Pittsburgh district, 501,799 gross tons of iron ore were imported through Baltimore in the 1954 period, against 314,757 gross tons in the equivalent period in 1953.

The final hearing in the proceeding before the Commission was concluded in December, 1954. The statistics indicating movements of import iron ore through Philadelphia and Baltimore relied upon in the final decision of the Commission were as current as it was possible and feasible to obtain. The court has remanded the case for findings regarding traffic movements since the close of the record before the Commission to the present time. There is nothing to indicate that such statistics, if produced, would alter the basic picture reflected by the statistics already of record and relied upon by the Commission. Even if that were not so, however, it is submitted that the court has exceeded its authority and acted arbitrarily in this regard. Clearly, records before administrative agencies must at some point be closed and may not be indefi-

nitely held open. If proceedings were remanded in every instance in which a district court considered the record not sufficiently current, there would manifestly be no end to litigation before administrative agencies.

4. The Commission found, based upon the entire record before it, that at parity rates on import iron ore Philadelphia and Baltimore would share the traffic; that without parity rates Philadelphia will not participate in the traffic. The court apparently disagrees with these conclusions, in large part because of its belief that ocean costs of moving ore from Labrador to Philadelphia will be lower than the cost of transporting ore from Labrador to Baltimore. It criticizes the Commission for failure to make more specific findings in that regard.

The court's position in this connection is based upon the unsupported premise that only Labrador ore is involved in this proceeding. Such is not the case, as the Commission's findings show. Moreover, it apparently is the court's view that with respect to Labrador ore the differences in ocean distances, Philadelphia versus Baltimore, will result in the exclusive use of the Port of Philadelphia at parity rail rates. That conclusion has no sound basis in the record before the Commission and although urged upon the Commission was not adopted. The court has erred in substituting its appraisal of the facts for that of the Commission and in remanding the case to the Commission for findings in the premises.

5. The court, contrary to the doctrine of *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, has insisted upon a specificity of findings by the Commission that is not required by the governing statutes. The Commission has clearly stated the basic findings

essential to support its ultimate conclusions and order and "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data * * *." *United States* v. *State of Louisiana*, 290 U.S. 70, 80.

CONCLUSION

For the reasons stated, it is submitted that the questions presented by these appeals are substantial, and it is urged that jurisdiction be noted and that the Decree of the court below be reversed in respect to the issues and questions raised by these appeals.

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. 9237

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, ET AL.,
Defendants.

SOPER, Circuit Judge:

This suit was brought by the Baltimore and Ohio Railroad Company, Western Maryland Railway Company, Canton Railroad Company and certain civic authorities and commercial organizations of Baltimore, Maryland, to set aside decisions and orders of the Interstate Commerce Commission which prescribed parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia and New York to seventeen destinations in the eastern portion of the so-called differential or Central Freight Association territory. This area lies west of a line from Buffalo, New York to Pittsburgh, Pennsylvania and includes Youngstown, Ohio on the north, Wheeling, West Virginia on the south and other intervening steel-producing points in western Pennsylvania, eastern Ohio and northern West Virginia.[1] The defendants, in addition to the United States

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[1] Differential territory is defined in *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691, 692. The seventeen points, all consuming or storage centers for iron ore, are Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowelville, Niles, Struthers, Warren, and Youngstown, Ohio; Benwood, E. Steubenville, Follansbee, Weirton and Wheeling, W. Va.

and the Interstate Commerce Commission, include as original or intervening defendants the Pennsylvania Railroad Company which serves the port of Baltimore as well as the ports of Philadelphia and New York, the New York Central Railroad Company and the Erie Railroad Company which serve the port of New York, the Port of New York Authority, the New York, New Haven and Hartford Railroad Company and the Boston and Maine Railroad Company which serve the Port of Boston, the Port of Boston Commission and divers producers and fabricators of steel in the differential territory.

The decisions of the Commission which are challenged in this proceeding mark the departure from a long established practice which has kept the rates applicable to both import and export traffic to and from differential territory lower as to Baltimore than the other Atlantic ports. The differentials were first established in 1877 by agreement of the carriers serving the territory in order to avoid misunderstandings in respect to the geographical advantages of Baltimore, Philadelphia and New York, as affected by rail-and-ocean transportation, so as to equalize the aggregate cost of transportation between competing points in the west and the domestic and foreign ports reached through those cities. The differentials were arbitrary in a measure since they reflected only in part the lesser distances to Baltimore and Philadelphia as compared with the distances to New York and Boston, but they were established by compromise as the only means of averting rate wars.[2] The differentials applied to all traffic eastbound and westbound, domestic and export-import, between Central territory and the north Atlantic ports. The differential on eastbound export traffic from the differential territory was 60 cents per ton less to Baltimore and 40 cents per ton less to Philadelphia than the corresponding rates to New York. On westbound import traffic the same differential applied to third

[2] See *Maritime Asso., Boston Chamber of Commerce* v. *A.A. R.R. Co.*, 95 I.C.C. 539, 567; 126 I.C.C. 199.

or fourth class and special commodity rates. Rates to Boston were not to be less than those to New York on domestic or foreign freight. In 1880 an attempt was made to modify the agreement on the ground that changes had substantially equalized ocean freights but after arbitration by the Thurman Advisory Commission the differentials established in 1877 were reaffirmed.

While this arrangement originated in a voluntary agreement of the carriers it has been considered by the Commission from time to time during the past 60 years when it was brought to the Commission's attention by commercial interests in Boston, New York, Philadelphia and Baltimore, and in each instance has been found lawful.[3]

Prior to 1930 the differential was applicable to both domestic and import-export traffic. In that year the Commission removed all domestic class rates from the scope of the differential rate structure and prescribed new scales of class rates from the several ports, based primarily on distance.[4] Under this new arrangement the longer distances from the three other ports resulted in a differential on domestic traffic to and from Baltimore, which exceeded the long established differential in its favor on import and

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[3] For a resume of the history of the differential, see *In the Matter of Differential Rates*, 11 I.C.C. 13 (1905); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151 (1936). It was also considered under varying circumstances in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C.C. 612 (1898); *In the Matter of Relative Rates upon Export and Domestic Traffic in Grain and Grain Products*, 8 I.C.C. 214 (1899); *Chamber of Commerce of N.Y.* v. *N.Y.C. & H.R. R.R. Co.*, 214 I.C.C. 155 (1912); *In the Matter of Import Rates*, 24 I.C.C. 78 (1912); *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691 (1929); *Lighterage Cases*, 203 I.C.C. 481 (1934); *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938); *State of New Jersey* v. *Baltimore & O. R. Co.*, 24 I.C.C. 581 (1941); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I.C.C. 165 (1941); *Ex Parte Grain from Buffalo to NY.*, 278 I.C.C. 31 (1950).

[4] *Eastern Case Rates Investigation*, 164 I.C.C. 314.

export traffic. The domestic first-class rates to Youngstown from Baltimore were fixed at $2.01 per hundred pounds, from Philadelphia $2.16 per hundred pounds, from New York $2.31 per hundred pounds, and from Boston $2.70 per hundred pounds. Since these rates did not cover import and export traffic the railroads in 1932 published new import and export class rates. These were made the same as the new domestic rates so far as Baltimore was concerned and the standard differentials in favor of Baltimore of 20 cents a ton with respect to Philadelphia and 60 cents a ton with respect to New York and Boston were preserved. The import-export class rates from the three cities last mentioned thus became generally lower than their domestic rates.

For some reason that is not explained, the rates on iron ore from Philadelphia to Pittsburgh have been the same as those from Baltimore to Pittsburgh since 1903. This parity, however, prior to the present controversy, has been only a paper equalization since there has been practically no movement from Philadelphia to Pittsburgh and no attempt has been made by the Baltimore railroads to set up a differential on this traffic.[5]

In 1949, in response to complaints from steel producers in the interior calling attention to the increased volume of movement and other changed conditions, the carriers undertook a study of the rate structure and as a result the Baltimore and Ohio, the Western Maryland, the Pennsylvania and connecting lines established, as of October 9, 1950, reduced rates on iron ore from Baltimore to Pittsburgh and also to steel mills in differential territory to the west. The Pennsylvania made a like reduction on iron ore

[5] In the seven years from 1946 to 1952 inclusive, 2,160,000 gross tons moved from Baltimore to the steel mills in Pittsburgh, and 652,500 tons from Baltimore to Johnstown. No tonnage moved from Philadelphia to Pittsburgh and only 8333 tons, comprising one cargo, to Johnstown. During the six years from 1946 to 1953 inclusive, approximately 647,000 tons moved from Baltimore to the steel mills in the Youngstown area and none from Philadelphia.

from Philadelphia to Johnstown and Pittsburgh. The new rates retained the regular port differential to destinations in differential territory and parity between Baltimore and Philadelphia on traffic moving to Johnstown and Pittsburgh. No action was taken at this time to establish revised rates on iron ore moving from ports other than Baltimore to differential territory, but the record of the conference of railroads shows that "it was understood the usual port differentials should be observed from the other north Atlantic ports."

In August 1951, the Pennsylvania, anticipating an increase in the volume of imported iron ore and conscious that it could not expect to share in the transportation of the commodity from Philadelphia to the interior without adequate unloading facilities at this port, announced that it would erect a modern unloading facility at Greenwich in South Philadelphia designed to cost not less than $10,000,000. It proceeded to erect such facility and had spent the greater part of this sum before publishing reduced rates on iron ore, effective February 9, 1953, to which reference will now be made. Unloading facilities were installed in Baltimore by the Canton Railroad in 1917.

It was against this background that the Interstate Commerce Commission, in the decisions now under review, gave its approval to parity of rates on iron ore moving from New York, Philadelphia and Baltimore to Central territory, but denied parity to Boston. The case grew out of the publication by the Pennsylvania of reduced rates on iron ore, effective February 9, 1953, from Philadelphia to the seventeen points in differential territory, and the simultaneous publication of like rates by the New York Central from the ports of New York and Boston, and by the Erie Railroad from New York to destinations in the Youngstown area on their lines. The effect of these publications was to reduce the rates on iron ore from Philadelphia, New York and Boston to Youngstown to $2.71 per

gross ton, the same rate which applied to Baltimore.[6] In order to meet this reduction and to preserve at least in part the historic differential, the Baltimore and Ohio and the Western Maryland then published, to be effective February 16, 1953, a reduced rate of $2.51 per ton on iron ore from Baltimore to those of the seventeen points on their lines, thus restoring a 20-cent differential in favor of Baltimore as compared with the other three ports. No attempt was made by the Baltimore railroads to restore the standard differential of 60 cents over New York and Boston.

The Baltimore and Ohio and the Western Maryland also published a reduction of 20 cents per ton, effective February 16, 1953, to Pittsburgh, Johnstown, Donora and Monessen in order to establish a differential on shipments of ore to Pittsburgh in accordance with the general port differential structure and to preserve a proper rate relationship between Pittsburgh and the other named cities. The Pennsylvania countered with a rate reduction of 20 cents per ton, effective February 16, 1953, from Philadelphia and Baltimore to the four named cities, and a further reduction of 20 cents in its rates from Philadelphia and Baltimore to the seventeen points in differential territory, effective March 11, 1953.

The Baltimore and Ohio, the Western Maryland and divers Baltimore interests protested the rate reductions by the other railroads and all of the above-mentioned reductions were suspended by the Commission pending an investigation instituted on February 6, 1953. This was followed by a hearing and oral argument, and an order of Division 2 of the Commission on February 5, 1954, which approved the reduction originally published by the Pennsylvania, effective February 9, 1953, giving Philadelphia a parity with Baltimore, but cancelled the tariffs of the New York Central and the Erie equalizing rates from New York and Boston with Baltimore. Division 2 also

[6] The rates are stated without the general increase approved in Ex-Parte No. 175.

found that the February 16, 1953 tariffs of the Baltimore and Ohio and the Western Maryland, and the March 11, 1953 tariffs of the Pennsylvania were not just and reasonable and ordered them to be cancelled. The Pennsylvania then published a supplementary tariff making the equalization of rates effective February 19, 1954, whereupon the Baltimore interests filed suit in this court asking a restraining order pending reconsideration by the entire Commission. The court refused to issue the order on the ground that the administrative process had not been completed, with the result that parity rates from Philadelphia went into effect and have since prevailed. The full Commission, on July 30, 1954, stayed its order cancelling the rates from Baltimore, New York and Boston and reopened the proceeding. Finally, on October 1, 1956, the Commission rendered its decision, finding that the February 9, 1953 rates from Philadelphia and New York were justified but that the February 16, 1950 rates from Baltimore, the March 11, 1950 rates from Philadelphia, and the February 9, 1953 rates from Boston were not justified and ordered them cancelled. In this proceeding we are concerned with the propriety of the Commission's action as to the rates from Baltimore, Philadelphia and New York.[7]

The modification of rates on iron ore by the railroads which serve the Atlantic ports in competition with Baltimore was brought about by important changes in business conditions involving an increased demand for steel and an increase in the importations of iron ore which theretofore had contributed little to the total volume of commodities transported by the railroads from the coast to the interior. The origins of the ore that has been and will be imported through the Atlantic ports have an important bearing on the controversy. No figures are available for the years 1955, 1956 or 1957 since the record before the Commission was closed on December 21, 1954, and the case is submitted

[7] By a subsequent decision filed on March 19, 1957, the Commission reaffirmed its decision as to the Boston rate.

to this court on the Commission's record. An outline of the conditions prevailing prior to and after World War II and until the Commission's record was closed is set out in the following excerpt from the report of Division 2 of the Commission:

"Mines in northern Minnesota, Wisconsin, and upper Michigan have for many years been the sole or principal source of supply for the iron-ore requirements of steel mills in central and trunkline territories, the preponderance of the ore moving by rail to Lake Superior docks, thence by water to lower Lake Erie ports, and by rail beyond. Prior to the end of World War II in 1945, importation of iron ore was comparatively light and the preponderance of the ore imported was consumed in furnaces at or near the eastern seaboard. Some imported ore moved to steel mills in the Johnstown and Pittsburgh, Pa. areas but little, if any, moved to mills west thereof. A few shipments which moved to interior points were consigned to manufacturers of paint or other commodities not produced by the steel mills.

"Since the end of World War II, steel producers have developed sources of supply for iron ore in Venezuela, Chile, Liberia, Brazil, Sweden, and Cuba, and this basic raw material of the steel industry has been imported in large volume. Mines now being developed in Labrador by the Iron Ore Company of Canada will supply large quantities of iron ore for the furnaces of five steel mills in central territory which own stock in that corporation, and to other consumers. During the 6-year period from 1936 through 1941 from approximately 2,000,000 to 2,500,000 tons of iron ore were imported annually. The import movement declined drastically during World War II, reaching a minimum of 402,096 tons in 1943, most of which originated in Canada. Following the war, importation of iron ore increased from 1,189,300 tons in 1945 to 10,145,415 tons in 1951, the latter figure equivalent to over 4 times the prewar tonnage. In 1952, a strike occurred in the steel industry and approximately 9,760,300 tons of iron ore were imported during that year. It is estimated that within a few years 20,000,000 tons of iron ore will be

imported annually, a substantial portion of which will move to furnaces in central territory. While ex-lake ore will continue to move from the Lake Erie ports in large volume, it will be replaced by imported ore to a greater extent than in the past."

The full Commission, in its report of October 1, 1956, commented upon the increase in importations of iron ore into the United States in the following excerpt from its decision:

> "Iron ore imported into the United States in 1948 originated in 28 foreign countries and aggregated 6,091,677 gross tons. By 1953 the tonnage had increased to 11,074,035 gross tons. The principal exporting countries in this period were Chile, Sweden, Venezuela, Brazil, Liberia, and Peru. On and between August 26 and October 6, 1954, a total of 1,511,875 gross tons of ore were shipped from 13 foreign ports to north Atlantic ports. Of this amount, 776,851 tons (51 percent) entered the Port of Baltimore, 718,809 tons (48 percent) entered the Port of Philadelphia, and 16,215 tons (1 percent) entered the Port of Boston. There was no reported entry of ore at New York during this period. Approximately one-third of this ore originated at Seven Islands, Labrador, from which no tonnage moved prior to 1954."

Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953 and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus; in the eight months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation. The facilities at Sparrows Point have a ca-

and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.'"

Section 15a(2): "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier, or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

THE BALTIMORE & OHIO RAILROAD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is reported in 151 F. Supp. 258.[1] The opinions of the Interstate Commerce Commission are reported in 291 I. C. C. 527 and 299 I. C. C. 195.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The judgment of the district court was entered May 22, 1957, and the United States filed its notice of appeal in that court on July 19, 1957. The jurisdiction of this Court to re-

[1] It is also printed as an appendix to the jurisdictional statement filed by the Interstate Commerce Commission, which appendix is incorporated herein by reference.

view the judgment on direct appeal is conferred by 28 U. S. C. 1251 and 2101, and is sustained by the following decisions: *United States* v. *Pennsylvania Railroad Company*, 323 U. S. 612; *United States* v. *Great Northern Railroad Company*, 343 U. S. 562; *New York* v. *United States*, 331 U. S. 284.

STATUTE INVOLVED

Pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 7–8.

QUESTIONS PRESENTED

The Interstate Commerce Commission approved as just and reasonable reductions in rail rates on imported iron ore from the ports of New York and Philadelphia to certain steel-producing areas, but disapproved a further reduction in such rates from the port of Baltimore. The district court vacated the part of the order that approved the reduced rates from New York; remanded to the Commission, for further findings, the part that approved the reduced rates from Philadelphia; and affirmed the part that disapproved the reduction from Baltimore. The following questions are presented:

1. Whether the district court's decision failed to give appropriate recognition and effect to the National Transportation Policy and to the powers which the Commission may exercise as a means of implementing that policy.

2. Whether the district court erred in precluding further consideration by the Commission of the proposed rates from New York and in failing to follow the course which it adopted in connection with the

proposed rates from Philadelphia, namely, remand to the Commission for further proceedings.

STATEMENT

The facts are set forth in detail in the jurisdictional statement filed by the Interstate Commerce Commission, to which we respectfully refer the Court. In brief, they are that, pursuant to a voluntary agreement among the railroads, for many years the rates on imported iron ore from the port of Baltimore to certain steel-producing areas generally have been 20¢ per gross ton less than such rates from the port of Philadelphia, and 60¢ per gross ton less than such rates from the port of New York. Until after World War II, very little traffic moved under any of these rates. 291 I. C. C. 527, 529.

In 1953, the railroads serving Philadelphia and New York proposed rate reductions which would have eliminated the differentials in favor of Baltimore, and the railroads serving the latter port proposed a further reduction designed to restore Baltimore's 20¢ differential over Philadelphia.[2] After full administrative proceedings, the Commission approved, as "just and reasonable," the proposed reductions from New York and Philadelphia, but disapproved, as not having been shown to be "just and reasonable," the proposed further reduction from Baltimore.

A specially constituted three-judge district court vacated the order insofar as it approved the reduced rates from New York, remanded it to the Commis-

[2] They did not attempt to restore the 60¢ differential over New York.

sion for further findings with respect to the Philadelphia rates, and affirmed the disapproval of the Baltimore reduction.

THE QUESTIONS ARE SUBSTANTIAL

1. The National Transportation Policy directs the Commission to administer the Interstate Commerce Act "to the end of developing, coordinating and preserving a national transportation system * * * adequate to meet the needs of * * * the national defense." In approving the new rate structure designed to eliminate the differential among Baltimore, Philadelphia and New York, the Commission held (299 I. C. C. 195, 209) that the National Transportation Policy made it "highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of" a commodity which "is of vital importance to the national defense" "through several ports." The record shows, as the district court stated (151 F. Supp. 258, 266), that "[a]dequate unloading facilities are essential to the delivery of iron ore at a point of entry"; that New York lacks such facilities (p. 267); and that such facilities would be established if New York had parity with Baltimore but would not be established "without assurances of parity of rates" (p. 271).

The scope of the Commission's power, in implementing the National Transportation Policy, to eliminate rate differentials in order to develop alternate ports of entry for commodities important to the national defense, presents substantial questions in the administration of the Interstate Commerce Act.

2. Assuming, *arguendo,* that the district court correctly held that the Commission's findings were inadequate to justify the elimination of the differential from New York, we think that the court nevertheless erred in vacating the order disapproving such rates, without giving the Commission an opportunity to make further findings on remand. In the case of the Philadelphia rates, with respect to which the court found that the Commission's findings were inadequate because they "do not show to what extent differences in distances by sea will influence the movement of the ore" through the various ports (151 F. Supp. at 277), the court remanded to the Commission "to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, * * *" (*id.,* p. 278. We submit that the court similarly should have remanded to the Commission to make such findings with respect to the port of New York. The failure to do so seems explicable only on the theory that the court took a narrow view of the extent of the Commission's powers. In our view, the disparity in distances between the ex-Baltimore and ex-New York movements does not in and of itself preclude equality of rates. And if further findings are required (as may well be the case) to demonstrate a need for eliminating the differential, it is erroneous to cut off the administrative process.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

September 1957.

APPENDIX

The declaration of the national transportation policy, incorporated in the Interstate Commerce Act by the Transportation Act of 1940, 54 Stat. 899 (49 U. S. C., notes preceding Secs. 1, 301, 901), provides:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3 (1) of the Interstate Commerce Act [49 U. S. C., § 3] provides:

It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular

necessary burden cast upon the reviewing court by failure of the Commission to include in its report a complete statement showing the grounds upon which its determinations rested. Just how far the Commission is obliged by statute to go in this particular is not so clear as it might be. The Commission does have the duty to set forth in its report the 'basic' or 'essential' or 'quasi-jurisdictional' findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree. United States v. Chicago, M., St. P. & Pac. Railroad Co., 1935, 294 U.S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; United States v. Baltimore & Ohio Railroad Co., 1935, 293 U.S. 454, 463, 55 S. Ct. 268, 79 L. Ed. 587; Florida v. United States, 1931, 282 U.S. 194, 315, 51 S. Ct. 119, 75 L. Ed. 291."

See also *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 449, 504-5; *Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 211-2; and Secretary of Agriculture v. United States, 347 U. S. 645, 658, where the failure of the Commission to explain adequately its departure from prior norms led to a remand of the case for more explicit findings.

The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the striking down of the long established differential in favor of Baltimore in order to enable Philadelphia and New York to have a share of the traffic and thereby insure their maintenance as ports of entry for the product.

The Commission in reaching its conclusions must of course give effect and adhere to the national transportation policy declared by Congress, which provides for the promotion of sound economic conditions among the several carriers and the establishment of reasonable charges for transportation services without unjust discrimination, undue preferences or advantages and without unfair or destructive competitive practices, to the end that a national transportation system may be built up, adequate to meet

the needs of the commerce of the United States and of the Postal Service and of the national defense. See Preamble to 49 U. S. C. §§1, 301, 901 and 1101. However, in effecting this policy it is made unlawful for any carrier to give any undue or unreasonable preference to any person, locality or port, or to subject any person, locality or port to undue or unreasonable prejudice or disadvantage. 49 U. S. C. §3(1). The statute also provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carriers proposing the rate to show that it is just and reasonable. 49 U. S. C. §15.

In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its conclusions and whether there was substantial evidence to support the findings. In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore. This ruling, moreover, has upset a railroad and Commission practice of many years duration in which the factor of distance was given effect. Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *New York v. United States*, 331 U.S. 284, 305; *United States v. Illinois Central*, 263 U.S. 515, 524.

What are the findings upon which the Commission relies as the basis for its conclusion that there should be parity of rates between the ports notwithstanding the factor of distance? As to Philadelphia and Baltimore they seem to be:

1. That there is parity in respect of rates between Baltimore and Philadelphia as to other routes which involve differences in distance;

2. That in any event the difference in distance to the differential territory, measured from Philadelphia and Baltimore, is so insignificant that it should be disregarded, and

3. That the needs of the producers of steel and the requirements of the Postal Service and of the national defense make essential the maintenance of a plurality of ports for the importation of iron ore into the United States.

The propriety and sufficiency of these findings must be appraised against the historic background in which the differential in favor of Baltimore has been maintained. Undoubtedly it originated in the natural advantages derived from the shorter distance of the port to destinations in the west and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports not only by practical railroad men but by impartial governmental authority in control. This practical solution of the difficulties arising from competition was based on solid legal ground, for it is settled that the law does not attempt to equalize opportunities among localities and that the natural advantage which belongs to a locality does not constitute a preference. *United States v. Illinois Cent. RR. Co.*, 263 U.S. 515, 524; *New York v. United States*, 331 U.S. 284, 331-2; *Alabama G.S.R. Co. v. United States*, 340 U.S. 216, 229. The Commission itself is without authority to adjust rates and differentials for the purpose of diverting traffic from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another. *Texas and Pacific R. Co. v. United States*, 289 U.S. 627, 639.

This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may

not reduce its rates to meet competition within a zone of reasonableness, but differences in rates based upon differences in length of haul, destiny of traffic and other elements of the cost of service are within a long standing practice of rate making, and a rate may not be filed for the purpose of diverting traffic from one locality in order to build up another. *Texas and Pacific R. Co. v. United States,* 289 U.S. 627, 636, 639. Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *New York v. United States,* 331 U.S. 284, 297, 298. The Commission in reaching its conclusion must consider all of these factors and may not condemn a difference in rates "unless it is shown not to be justified by the cost of the respective services, by their values, or by other transportation conditions." *United States v. Illinois Cent. R.R. Co.,* 263 U.S. 515, 524.

In passing upon the merits of the case, the Commission gave no consideration to the cost or value of the services of the railroads competing for traffic at Philadelphia and Baltimore. No evidence on these points was offered or required; but the ultimate finding of the Commission as to distances from Philadelphia and Baltimore to Central territory was that the difference is so insignificant that the service from both ports is substantially identical. Evidence to support this finding seems to us to be lacking. Not only does the disparity, which had been considered substantial for many years, still exist, but the only standard of measurement proffered by the Commission for its finding was obviously incorrect. The Commission declared that the actual operating route from Philadelphia to Central territory is only 11 miles greater than the operating route from Baltimore. This seems convincing until it appears, from a careful reading of the decision, that the Commission is comparing the distance via the Pennsylvania from Baltimore with the distance via the Pennsylvania from Philadelphia and that in doing so it measures the distance from Philadelphia over a direct route, but measures the distance from Baltimore over a circuitous line through Perryville, which the railroad company adopts for its own convenience.

Clearly this treatment was wrong. The comparison should be made on the same basis in each instance, for example, between the short line distances or between the short tariff distances from both ports, which shows a difference of 47 miles in the one case and 24 miles in the other. It is fair to say that the Commission, contrary to its former policy, either gave no weight whatever to the factor of distance or found that it was overborne by the general policy of supplying the needs of national commerce and the requirements of national defense.

We do not overlook the existence of parity of rates despite disparity of distances in respect to other commodities over other routes to which the Commission referred in its decision, seemingly as precedent for its present action. There was nothing new in this situation. These other rates had long existed but in spite of them the differential in favor of Baltimore on traffic moving to the Central territory had been maintained and carriers serving the port in reliance upon it had adjusted their rates and provided and maintained adequate facilities. We think that these other rates furnish no reasonable basis for change of view on the part of the Commission.

It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system. How far the Commission's authority extends in this direction is an interesting and important question. The respondents stress the passage of the Act of September 18, 1940, 54 Stat. 899, whereby the Act to regulate commerce was amended to include the introductory declaration of the national transportation policy. This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the

enforcement of all the provisions of the statute.[10] No one suggests, however, that the Commission has general authority to build up the transportation system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

For our purposes it is enough to determine whether there is substantial evidence to support the finding that a radical change in the rates was needed to support the national policy. In the first place, it is to be noted that there is no evidence of financial weakness on the part of the railroads involved as has led the Commission in some cases to fix rates in aid of the financial necessities of certain carriers. See *New England Divisions* case, 261 U.S. 184. The decision of the Commission is based on the general conclusion that the northerly ports will have no share in the transportation of imported iron ore so long as the differential exists because ocean freights have been generally equalized since 1920 and the ore will inevitably be shipped to the port which enjoys the cheapest railroad rate to the interior.

Definite findings are made as to the ocean distances from major sources of iron ore to the north Atlantic ports, which show the distances from Labrador to be 950 miles to Boston, 1187 miles to New York, 1320 miles to Philadelphia and 1470 miles to Baltimore; and it is said that a round trip between Labrador and Baltimore requires about three more days than a round trip between Labrador and Boston.

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[10] *Luckenbach S.S. Co.* v. *United States*, 122 F. Supp. 824, affirmed, 347 U.S. 984; *Atlanta & St. Andrew's Bay Rwy. Co.* v. *United States*, 104 F. Supp. 193; *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 576; *Pacific Island Tariff Bureau* v. *United States*, 129 F. Supp. 472.

The Commission, however, does not attempt to review the considerable body of testimony bearing on the relative costs of ocean travel to the several destinations. A witness is quoted as saying that at the present time iron ore from foreign ports moves both in vessels owned by the steel companies and in chartered vessels; that charter agreements may be voyage charters or time charters; that the ocean rates of voyage charters are equalized to all North American ports; but that in some instances there is a cost saving in routing ore to the nearest port "on a time charter or for an integrated shipper."

These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore. There was direct testimony that water costs bear a direct relationship to the time spent in transit; that the investments in large ore carrying vessels and operating costs are high, ranging from $1,000 to $2,000 per day, that the shipping season from Labrador is short and that time consumed in making round trips is an important element in moving the maximum tonnage to the destination; that vessels under a time charter and vessels owned by the steel companies would be routed to the nearest port, all other factors being equal; and that the ownership of vessels by the steel companies is expanding. The weight of all this testimony tends strongly to support the view that ocean costs will be an influential if not a determining factor in selecting the ports of destinations, which basis is lacking for the general conclusion of the Commission that without parity of rates Philadelphia will have no share in the traffic. On the contrary, shipments during a few months in 1954, the only period considered, indicate that under parity the ore will go to Philadelphia rather than to Baltimore, since Philadelphia enjoys the double advantage of smaller ocean costs and the most modern unloading facilities.

In the absence of specific findings, it does not seem reasonable to destroy a long established differential on the strength of which the railroads serving Baltimore have

made large investments and the commercial interests of the port have made their arrangements. Obviously it is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to greatly increase. The port will still be entitled to the benefits of its geographical position and the expected profits of the new business may not be diverted merely to satisfy the desire of other ports to share therein.

We think, however, that the record furnishes a reasonable basis for the decision of the Commission to retain parity of rates between Baltimore and Philadelphia in respect to traffic to Pittsburgh. Similar reasons for the maintenance of the status quo apply as in the case of Baltimore. It is true that, so far as iron ore is concerned, only a paper rate was involved until recently; nevertheless, parity has existed for more than 50 years with the acquiescence of Baltimore, and it was retained without objection in the revision of rates in 1950 when the rate of imported iron ore from Philadelphia to the Pittsburgh area was reduced by the same amount as the rate from Baltimore. While there had been no significant movement of iron ore from Philadelphia to the steel mills in the Pittsburgh area during this period, there was, as the report of Division 2 of the Commission shows, a substantial movement from Baltimore to this district. The Pennsylvania Railroad announced its intention, in August 1951, to erect a modern unloading facility in South Philadelphia with the obvious purpose to share in this traffic and in its expected increase, but no objection to the existing parity of rates came from the Baltimore railroads until they made their tactical move in 1953 in order to preserve the consistency of their position.[11] In our

[11] The respondent railroads contend that parity as to Pittsburgh is inconsistent with the differential as to the Central territory, pointing out that Youngstown, one of the points in that territory, is 66 miles distant from Pittsburgh over the Pennsylvania Railroad as compared to 76 miles over the Baltimore and Ohio. This incongruity, however, does not present a new element for it has

opinion, it is of great significance that Philadelphia interests have made a large capital investment in providing unloading facilities in the belief that the historic situation would be retained; and it would be unreasonable at this time to deny them the opportunity to make use of the structure which they have set up.

The lack of substantial basis for the allowance of parity to the Port of New York is shown by what has already been said; but it may be added that the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to considerations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs of 38.8 cents per ton. For this reason alone the rate was found to be just and reasonable; and yet in the same opinion the Commission found that the rate of $2.51 from Baltimore, proposed by the Baltimore railroads to take effect February 16, 1953, that is to say, 20 cents under the current rate, would not be just and reasonable, although the evidence shows that the return thereon would exceed the return on the New York rate which the Commission approved. As the four dissenting commissioners point out, the only justification in the record for the proposed rates from New York "is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore."

We conclude (1) that the orders of the Commission should be affirmed insofar as they disapprove the schedules filed to become effective on February 16, 1953, proposing reduced rates from Baltimore to the Pittsburgh and Central areas, and the schedules filed to become effective on

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existed throughout the history of the differential and, in any event, we are concerned not with the comparative distances from Pittsburgh but with comparative distances from the Ports of Philadelphia and Baltimore.

March 11, 1953 from Philadelphia to the Central area; and (2) that the orders be vacated insofar as they approved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined; and (3) that, insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect; and (4) that, pending said findings and a decision based thereon, parity between the ports of Philadelphia and Baltimore be retained upon the assumption that steps be taken to secure a prompt determination.

The orders of the Commission are modified and the case is remanded to the Commission for further proceedings consistent with this opinion.

We concur in this opinion:

W. CALVIN CHESNUT,
United States District Judge.

R. DORSEY WATKINS,
United States District Judge.

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND

THE BALTIMORE AND OHIO RAILROAD COMPANY, CANTON RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY, BALTIMORE ASSOCIATION OF COMMERCE, THE BALTIMORE CHAMBER OF COMMERCE, THE STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC., BALTIMORE CUSTOM HOUSE BROKERS AND FORWARDERS ASSOCIATION, THE MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE PENNSYLVANIA RAILROAD COMPANY, AND C. W. BOIN, AGENT, AND THE NEW YORK CENTRAL RAILROAD COMPANY AND ERIE RAILROAD COMPANY,

Defendants.

CIVIL ACTION No. 9237

Decree

This 22d day of May 1957, the Court adopts the findings of fact and conclusions of law appearing in the Opinion filed herein on April 26, 1957, and holds that the Interstate Commerce Commission's Order of October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed; TO WIT, it is:

ORDERED, ADJUDGED AND DECREED

1. That the order of the Interstate Commerce Commission dated October 1, 1956 is vacated insofar as it approves the tariff schedules on iron ore from New York filed to be effective February 9, 1953, and authorizes the establishment of the rates on iron ore named in said schedules.

2. That the Temporary Restraining Order issued by the Court on October 26, 1956 enjoining the United States and the Interstate Commerce Commission from taking, authorizing, approving, or permitting any action, by any railroad company, particularly the New York Central Railroad Company and the Erie Railroad Company, which would have the effect of establishing or making effective the tariff schedules on iron ore from New York filed to be effective February 9, 1953, is made permanent.

3. That the Interstate Commerce Commission shall make and enter an appropriate order requiring the New York Central Railroad Company and the Erie Railroad Company to cancel their tariff schedules on iron ore from New York published to be effective February 9, 1953.

4. That the order of the Interstate Commerce Commission dated October 1, 1956 insofar as it approves the tariff schedules of the Pennsylvania Railroad Company on iron ore from Philadelphia filed to become effective February 9, 1953 is not supported by essential basic findings, and therefore is remanded to the Interstate Commerce Commission to make more explicit findings as instructed by the Court in the Opinion filed herein.

5. That the rates named in the tariff schedules of the Pennsylvania Railroad from Philadelphia published to become effective on February 9, 1953 be permitted to remain in effect pending said reconsideration and final decision by the Interstate Commerce Commission.

6. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it dis-

approves tariff schedules on import iron ore from Baltimore published to be effective February 16, 1953.

7. That the order of the Interstate Commerce Commission dated October 1, 1956 is affirmed insofar as it disapproves tariff schedules on import iron ore from Philadelphia published to be effective February 16, 1953 and March 11, 1953.

MORRIS A. SOPER,
United States Circuit Judge.

W. CALVIN CHESNUT,
United States District Judge.

R. DORSEY WATKINS,
United States District Judge.

APPENDIX C

THE STATUTE INVOLVED

The pertinent provisions of the statute involved, the Interstate Commerce Act (Title 49, United States Code), are:

NATIONAL TRANSPORTATION POLICY: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carryng out the above declaration of policy."

Section 1(5): "All charges made for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1): "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, com-

pany, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 14(1): "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 15(1): "That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to

which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(7): "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid,

pacity of 6,000,000 tons and those at Fairless have a ca pacity of 2,000,000 tons annually. None of the ore delivered to Sparrows Point moves to differential territory. We are concerned primarily with the importations of iron ore that are delivered to the railroads for transportation to interior points subject to the published rates.

Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation. From July 31, 1954, when these shipments began, to December of that year, 1,375,747 tons were unloaded at Baltimore and Philadelphia; and it seems certain that this was merely a beginning for, as the Commission said in its final report, the evidence leaves no doubt that "Labrador tonnage will increase to 10,000,000 tons in 1956 and probably to a greater extent in later years." In short, importations from Labrador may be expected to constitute at least one-half of all the ore imported. The proportion of this business which will come to Baltimore and Philadelphia, respectively, is foreshadowed, although imperfectly, by what happened in the last six months of 1954. In that period 744,017 tons came to Baltimore and 631,730 tons to Philadelphia. The Philadelphia tonnage would have been greater and the Baltimore tonnage less by 113,210 tons but for a strike which caused a diversion to Baltimore to tonnage consigned to Philadelphia.

The effect of the abolition of the differential between Philadelphia and Baltimore, which became effective on February 19, 1954, is shown to some extent by comparison of deliveries of foreign ore from all sources to railroad piers at the two ports in 1953 and 1954. In the first year Baltimore received 1,813,512 tons of which 808,875 were delivered to the railroads for shipment to the differential territory, while Philadelphia received 1,113,917 tons of which 687,994 tons were delivered to the railroads to be delivered, 20,561 tons to Pittsburgh and 667,433 tons to points east of Pittsburgh—none of it going to the differential territory. In 1954, Baltimore received, 1,644,294 tons

and of this 1,070,457 tons went to destinations west of Pittsburgh; while in this year Philadelphia received 1,564,844 tons of which 681,599 tons went to the differential territory.

The future movement of foreign ore to this country, especially ore from Labrador, is the all-important circumstance in this case. The Labrador deposits are owned by the Iron Ore Company of Canada, of which 27% is owned by the M. A. Hanna Coal and Ore Company and the balance by five steel producers[8] owning plants west of Pittsburgh, including twelve or thirteen plants in differential territory. These corporations are entitled to share in the product in proportion to their interests. The steel producers in differential territory will use their shares and the balance will be sold, for the most part, to the Bethlehem Steel Corporation. All of the ore is shipped from Seven Islands, Quebec. While some of it will move by routes not involved in these proceedings, five or six million tons will move annually through Atlantic ports to inland furnaces. The ore will be carried in ships owned or chartered by the Iron Ore Company of Canada or the participating companies; and the record shows that, in order to save transportation costs by sea, the ore will be delivered, in case of parity of railroad rates, to the nearest port equipped with efficient unloading facilities. The Commission found that the one-way ocean distances from Seven Islands to the four Atlantic Coast to be: Boston, 950 miles; New York, 1,187 miles; Philadelphia, 1,320 miles, and Baltimore, 1,475 miles. If the Chesapeake and Delaware Canal were used the excess distance to Baltimore over Philadelphia would be 26 miles, but the Commission found that the larger ore vessels cannot use the canal at present and probably would not use it if the canal were deepened. The evidence shows that a 20,000 ton ore carrier with a speed of 14 knots requires three days less steaming time on a round trip basis from Seven Islands to Boston, two days less to New York

[8] National Steel Co., Republic Steel Corp., Armco Steel Corp., Youngstown Sheet and Tube Co., Wheeling Steel Corp.

and twenty-one hours less to Philadelphia than to Baltimore; and that it costs $2,000 per day to operate such a ship. Abolition of the differential of 20 cents per ton in favor of Baltimore and the establishment of parity of railroad rates between Philadelphia and Baltimore would cause shippers to route Labrador ore destined for differential territory through the Port of Philadelphia.

Since the Commission's decision of October 1, 1956 took no account of any shipments subsequent to December 1954, the effect of the parity of rates between Philadelphia and Baltimore in the intervening period was not ascertained, although it might have been done before the decision was rendered. The record, however, throws some light, as we have seen, on the shipments in the limited period between February 19, 1954, when the Pennsylvania put the parity rates into effect, and December 1954. The evidence directed to this period, although necessarily meager, tends to confirm the opinion of experienced witnesses heard by the Commission, that under parity rates Labrador ore destined for differential territory will move through Philadelphia and not through Baltimore. The experience of the Canton Railroad emphasizes this conclusion. This is a shipping road with 37 miles of track in the Port of Baltimore, connecting with the Baltimore and Ohio and the Pennsylvania by rail and the Western Maryland by float. It constructed the first unloading facilities in Baltimore in 1917, in which it has invested $5,000,000 in reliance upon the differential. It is largely dependent upon the importations of ore. In 1952, its tonnage of imported ore comprised 55% of its total of which 39% was iron ore; and in 1953, the corresponding percentages were 66% and 28%; respectively. In the first nine months of 1953, it received 499,000 tons of iron ore but in the same period in 1954 under parity this amount had diminished to 239,000 tons, a decrease of 52%.

A similar situation exists with regard to the much smaller amount of ore which is brought to this country from the Port of Monrovia in Liberia. This ore is controlled by the

Republic Steel Corporation, which has furnaces in differential territory and carries the ore in its own ships. In 1952, 420,000 tons were imported and it was estimated that in 1953 the amount would be somewhat larger. Heretofore all or nearly all of this ore was delivered at the Port of Baltimore. The ocean distances (miles) from Liberia to the Atlantic ports are as follows: Boston 3920; New York, 3973; Philadelphia, 4074, and Baltimore, 4194.

The iron ore brought in from South America and Scandinavia has little bearing on the question at issue. The Commission found that, in the first nine months of 1954, 94% of the ore which originated in Venezuela, Chile, Peru and Sweden was consigned to the United States Steel Corporation and the Bethlehem Steel Corporation. Bethlehem received about 6,000,000 tons, none of which moves to differential territory. It is estimated that United States Steel will receive about 7,000,000 tons annually, of which 2,000,000 tons will enter the United States through the Gulf ports and 2,000,000 tons more will be consumed at Fairless. There will be a substantial movement from the docks owned by the corporation at Fairless by rail to Pittsburgh. Facilities at Fairless permit the blending of the iron before shipment to Pittsburgh and this service will be improved, and when this is done the United States Steel Corporation will abandon its practice of importing through Baltimore the iron ore for use at Pittsburgh. The corporation is not interested in the rate from Baltimore but desires a lower rate from Fairless to Pittsburgh. Baltimore has an advantage as to distances over the other ports with respect to shipments of ore from South America, except Brazil, but a disadvantage with respect to the shipments from Scandinavia.

Adequate unloading facilities are essential to the delivery of iron ore at a point of entry. Canton Railroad, as we have seen, was the first to establish such a facility in Baltimore in 1917. The Western Maryland followed in 1930, and its facility with subsequent improvements can now handle three ships at a time. The Baltimore and Ohio pier was

built in 1950 and 1951 and cost $5,000,000. The capacity of these three piers in Baltimore is 13,500,000 tons per year, based on a 15% use of specially designed ore carrier type ships, and if the use of such ships is raised to 65% the total capacity will be increased to 22,275,000 tons per year. These facilities were constructed while the differential was in effect.

In March 1954, the Pennsylvania completed the first stage of its unloading facility at a cost of $11,000,000. The capacity is from 3,000,000 to 6,000,000 tons of ore, depending on the type of ship. An enlargement, which would have increased the capacity of the facility by 50%, was ordered in 1954 and scheduled to be finished in 1955. The Pennsylvania contemplates an ultimate expansion which would enable it to treble its original capacity. It estimated that it needed 2,500,000 additional tons of ore per year to maintain its Philadelphia pier profitably. These facilities were established while there was parity of rates between Baltimore and Philadelphia on traffic moving to Pittsburgh.

Bethlehem at Sparrows Point and the United States Steel at Fairless each has its own unloading facility. The first has been in operation since 1946 and the latter since January 1953.

New York and Boston have no modern ore unloading facilities and only a very small tonnage of iron ore passes through these ports. Without parity of rates with Philadelphia and Baltimore no facility is planned at either location.

The relation of the rates to the distances for which iron ore is transported from the Atlantic ports to the differential territory is a factor necessary to be considered in this case since §3 of the statute forbids a carrier to give any undue or unreasonable preference to any port or locality, or to subject any port or locality to any undue or unreasonable prejudice. The short line distances of the railroads from the several ports to Youngstown, Ohio, that is, the shortest physical routes over which traffic may be moved without

transfer of lading, although through rates and routes may not be published, are as follows:

To Youngstown, Ohio

From:	Short Line Distance Miles	Difference In Distance Over Baltimore Miles
Baltimore	378	—
Philadelphia	424	46
Morrisville	437	59
New York	490	112
Boston	646	268

The short tariff route distances between these points, that is to say, the shortest routes from each port over which rates on iron ore are actually published, are as follows:

To Youngstown, Ohio

From:	Short Tariff Route Miles	Excess Over The Shortest Tariff Route From Baltimore (W. Md.—381 Miles)
Philadelphia:		
P.R.R.	428	47
Morrisville:		
P.R.R.	441	60
New York:		
Erie	569	188
N.Y.C.	612	231
Boston:		
N.Y.C.	670	289
B. & M.	661	280
N.Y., N.H., & H.	692	311

For reasons of convenience, the Pennsylvania moves iron ore traffic over longer and more circuitous routes from both Philadelphia and Baltimore to Youngstown. The route

which it uses from Philadelphia (434 miles) is practically the same as its short tariff route therefrom (428 miles); but instead of using its short tariff route of 404 miles from Baltimore, it carries the shipments 423 miles through Perryville, Maryland. If its actual operating route from Philadelphia is compared with its actual operating route from Baltimore, the difference in distance is only 11 miles; but if this operating route from Philadelphia is compared with the short operating route from Baltimore — that of the Western Maryland Railroad — Philadelphia's excess distance is 53 miles.

The decisions of the Commission are set forth in the report of Division 2 on February 5, 1954, 291 I.C.C. 527, and the report of the full Commission on October 1, 1956, 299 I.C.C. 195. The latter dealt principally with additional evidence adduced in the interval and seems to have adopted the report of Division 2 except that it approved the new schedules from New York to the Youngstown area which Division 2 had rejected. The reports recite in considerable detail the history of the differential, hereinbefore set out, and the contentions of the opposing sides;[9] and the findings

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[9] The Commission notes the contentions of the Pennsylvania that parity between Baltimore and Philadelphia is necessary so as not to stifle the importation of iron ore through Philadelphia and so as to enable the steel producers to make proper use of the new facilities at Philadelphia; that the differential was never intended to apply to low-grade bulk material and hence parity did not constitute a departure from the former practice; that Baltimore did not object to parity with Philadelphia on traffic moving to the Pittsburgh area for 50 years and that all imported iron ore moves through Pittsburgh; that the commercial interests of Baltimore will not be injured since parity as far as the Pittsburgh area has not disrupted the general port differential adjustment and the great increase in imports of iron ore will provide ample tonnage for Baltimore's unloading facilities. On the other hand, the Commission takes cognizance of the contentions that interests serving the port of Baltimore are entitled to reap the natural advantages flowing from its location; that parity would deprive Baltimore of these advantages and place the entire port differential rate structure in jeopardy by giving rise to demands for reduced rates on

of the Commission, which are sometimes mingled with the statement of the contentions of the parties, and the ultimate conclusions of the Commission are then set forth. They may be summarized as follows:

It is shown by a statement filed by the Pennsylvania in support of its claim to parity, which the Commission seems to have found correct, that parity of rates on iron ore applies both from Baltimore and Philadelphia to Steelton, Pennsylvania, a steel producing point east of Pittsburgh; also from Baltimore and Philadelphia to Buffalo, although the route from Baltimore over the Baltimore and Ohio is 190 miles and that over the Western Maryland is 165 miles longer than the route from Philadelphia over the Pennsylvania. A similar comparison is made between routes from Baltimore and routes from Norfolk to steel mills in Ohio and Michigan as to which parity prevails, although the distances from Norfolk are from 25 to 192 miles longer than the distances from Baltimore. Likewise parity of rates but disparity of distances exist in rates from Lake Erie ports to steel mills in the Youngstown and Wheeling areas, as to which reference is made to the decision of the Commission in *Iron Ore Rate Cases*, 41 I.C.C. 181, in which the Commission pointed out that blast furnaces must be operated continuously and that it is of advantage to the steel producers and also to the operators of the vessels to have more than one port available. It was also shown that there is a movement of large quantities of eastbound ore from Erie and Buffalo to the steel mills at Bethlehem, Fairless, Philadelphia and Sparrows Point under a parity rate of $2.71 — notwithstanding the inequality of distances; and it was said that the earnings under the proposed rates from

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other imported bulk commodities; that the earnings on tonnage carried from Baltimore was substantially greater than on tonnage carried from Philadelphia to the differential territory because of the shorter distances from the former port; that parity of rates on iron ore from Baltimore and Philadelphia to Pittsburgh during the past 50 years should be disregarded because there was no movement from Philadelphia to Pittsburgh under this schedule.

Philadelphia to steel mills in the Youngstown area compare favorably with the earnings under the $2.71 rate from Erie and Buffalo to eastern furnaces.

In both reports the Commission seems to have approved the contention of the Pennsylvania that there are only 11 miles difference between the transportation routes from Philadelphia and Baltimore to the differential territory and, therefore, the services from both ports are substantially identical. In its final report the Commission said:

> "The Pennsylvania urges also that rates from Philadelphia the same as those from Baltimore are justified by mileage and service factors. The average tariff-route distances over the Pennsylvania to the 17 destinations in differential territory are 422 miles from Philadelphia and 398 miles from Baltimore. Based on these distances, the equalized rates yield average ton-mile revenues of 6.4 mills from Philadelphia and 6.7 mills from Baltimore. The actual operating route of the Pennsylvania from Philadelphia is only 11 miles greater than its actual operating route from Baltimore. In both instances, the movement is via Pittsburgh, and approximately 75 percent of either haul is over the same tracks. Thus, the service over the Pennsylvania is substantially identical from both Philadelphia and Baltimore."

This statement seems to say that, in considering difference of distance between Baltimore and Philadelphia, the comparison should be made between the Pennsylvania's direct route from Philadelphia and its unnecessarily long route from Baltimore via Perryville, rather than between the tariff route of the Pennsylvania from Baltimore and the corresponding routes of the Baltimore railroads from Baltimore.

Division 2 of the Commission had little to say about the movement of the Labrador deposits because they had not begun to move prior to February 5, 1954, when the report was filed. The Commission merely quoted an owner of stock in the Iron Ore Company of Canada as saying that five or six million tons of ore will be available for shipment

in 1955 and that 10,000,000 tons are likely to be shipped in 1956. It is also pointed out that vessels of eighteen to twenty-eight thousand tons capacity will be used in transporting the ore to the north Atlantic ports; that a large number of railroad cars will be required; that economic necessity will require the movement to take the route from Seven Islands to the mills entailing the lowest transportation costs; and that alternate ports at equal rates are required in order to avoid congestion and to give the steel mills the opportunity to select the port to be used.

In the Commission's report, reference is made to its opinion *In the Matter of Rate Differentials*, 11 I.C.C. 13, which considered the Baltimore differential in 1905. The Commission said that at that time ocean rates favored the northerly ports but now iron ore moves in both chartered vessels and vessels owned by steel companies, and since 1920 ocean rates generally have been equalized with respect to voyage charters to the north Atlantic ports, but in some circumstances there is a saving of cost in routing the ore to the port nearest point of origin and that this might be true on a time charter arrangement or for an integrated shipper. The Commission then pointed out the approximate ocean distances from various points of origin to the Atlantic ports and also set out the figures which showed the amounts of Labrador ore received at Baltimore and at Philadelphia in the period from July 31 to December 5, 1954. The Commission, however, made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore. The Commission's figures as to the tonnage received at these two ports is limited to the period from July 31 to December 5, 1954, and no evidence was offered or considered as to the shipments during the year 1955 and 1956 preceding the date of the Commission's decision. The Commission did not pass on the testimony heretofore referred to in this opinion indicating that Labrador ore would seek the port offering

the lowest cost of transportation from the point of origin to the destination in steel producing territory.

The Commission did not undertake to appraise the relative weight of the various factors entering in its decision, but Division 2 stated the following general conclusions with respect to the proposed rates from Philadelphia, New York and Boston:

> "The evidence in support of the proposed adjustment from Philadelphia is substantially stronger than that offered in behalf of the proposed rates from New York and Boston. We are convinced that, in view of the earnings that would be yielded by the suspended rates from Philadelphia, such rates are not below a minimum reasonable level. We are of the view further that establishment of the proposed rates from Philadelphia will not result in disrupting the existing port relationship on traffic generally to destinations in differential territory. As indicated, the rates on iron ore from Baltimore and Philadelphia to the Pittsburgh area have been on a parity for over 50 years without disturbing the port relationship on the other commodities, and no good reason appears why the extension of this parity to ore-consuming points beyond Pittsburgh should change this situation. The record is persuasive that the iron ore tonnage through Baltimore will probably continue to increase regardless of the movement through Philadelphia.
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> "Moreover, in administering the provisions of the act the Commission is required to carry out the national transportation policy, which has for its ultimate objective the develpoment, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. The evidence is certain that in the years to come a large proportion of the iron ore used in this country will originate in foreign countries. This iron ore is and will be an important factor in national defense. Especially in case of national emergency, it is highly desirable that the needs of the steel industry be not jeopardized by forced reliance upon one port which could be incapacitated through congestion or other cause, and

that, in the interest of national defense, Philadelphia and Baltimore be placed on a rate parity on imported iron ore as proposed in the schedules filed to become effective on February 19, 1953. Such a parity would not result in undue preference or prejudice."

Division 2 reached the ultimate conclusion that the proposed rates from Philadelphia to the differential territory were just and reasonable but that the rates from New York and Boston were not shown to be just and reasonable.

The general conclusions of the full Commission reaffirmed Division 2 with respect to rates from Philadelphia. They found that a substantial increase in iron ore imports would continue in that Labrador tonnage would increase to 10,000,000 tons in 1956 and to a greater extent in later years, and that the tonnage through Baltimore would probably continue to increase notwithstanding the maintenance of a parity rate with Philadelphia and also with New York. The Commission also reaffirmed the conclusions of Division 2 with respect to the necessity for parity in carrying out the national transportation policy. In this respect it said:

"As stated in the prior report, we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its full share of the transportation burden, but it is of vital importance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports. These matters, among others of record, have been given consideration in reaching our conclusions herein."

New York and Boston rates:

The railroads serving New York and Boston pointed out the importance of being allowed to share in the new traffic based upon the importation of iron ore so as to replace the large revenues now received from domestic iron ore moving eastward from the Minnesota-Michigan ranges. The railroads also stressed the fact that business interests could not be expected to invest capital in constructing unloading facilities at New York or Boston unless parity of rates was established with Baltimore and Philadelphia, enabling the more northerly ports to share in the business; and they also emphasized the importance of having one or more ports available to handle the new importations.

Division 2 of the Commission, however, pointed out the greater distances from New York and Boston to the differential territory and resulting in the smaller earnings at these ports under parity of rates. It said:

> ". . . From New York and Boston to the 7 destinations in the Youngstown area, the short-line distances average 487 and 642 miles, respectively, whereas to the same destinations the short-line distances average 424 miles from Philadelphia and 380 miles from Baltimore. The average short-line distance from Philadelphia exceeds that from Baltimore by only 11.6 percent whereas the like distances from New York and Boston are greater by 28 and 70 percent, respectively, than the distance from Baltimore.
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> "The proposed rates from Philadelphia compare favorably with rates applicable on iron ore from and to points in central and trunkline territories and thus come within the 'zone of reasonableness' to which reference is made in *New York Central R. Co.* v. *United States, supra.* The proposed rates from New York and Boston would produce substantially lower revenues from those from Philadelphia. Moreover, the record shows that the facilities at New York and Boston are not adequate for the unloading of iron ore in substantial lots, and there is no positive indication that adequate facilities would be constructed thereat or that any substantial movement through those ports under

the proposed rates could be expected. We conclude that, in the circumstances, the proponents of the proposed rates from New York and Boston have not sustained the statutory burden placed upon them to prove that these rates are just and reasonable."

Subsequent to the decision of Division 2 additional testimony was taken in which witnesses for the Boston and Maine and the New York, New Haven and Hartford indicated that unloading facilities would be established at Boston if equal rates with Baltimore were permitted, and similar representations as to the establishment of facilities at New York were made by persons interested in the development of that port. It was however made clear by all of the witnesses that facilities would not be established without assurances of parity of rates.

The Commission then made a comparison of revenues from the four north Atlantic ports to destinations in the Youngstown area. In one computation, using short-line distances, the following tabulation was made of the car-mile and ton-mile revenues on an average load of 62 gross tons and the rate from Baltimore of $3.035, which included the Ex-Parte No. 175 increase, i.e., a general increase applied by the Commission to all the rates:

From:	Short-Line Distances Miles	Car-Mile Cents	Ton-Mile Mills
Baltimore	378	49.8	8.0
Philadelphia	424	44.4	7.2
New York	490	38.4	6.2
Boston	646	29.1	4.7

The Commission then considered certain cost studies submitted by the Erie Railroad for the single line haul from New York to Youngstown and for the joint haul with other railroads from Boston, and stated the final conclusion:

"We have carefully considered all of the evidence pertaining to the estimated out-of-pocket cost from New York and Boston. After restating the costs on the

bases indicated, including the distribution of the costs of freight-train repairs, depreciation, and rentals of other than mileage cars over freight-train car-miles, loaded and empty, and the application of the unit cost to the loaded and empty car-miles of the imported ore traffic, we conclude that $2.647 and $3.42 would more nearly approximate the out-of-pocket costs per gross ton from New York and Boston, respectively. On these bases, the rate of $3.035 would exceed the cost from New York by 38.8 cents per gross ton, but would be 38.5 cents less than the costs from Boston."

On this basis the Commission found that the Baltimore rate would be just and reasonable as applied to New York, but would not be just and reasonable as applied to Boston.

The Commission also found that the $2.51 rate from Baltimore to Youngstown proposed by the Baltimore railroads as of February 16, 1953, would not be just and reasonable despite the fact that a comparison of the car-mile and tone-mile revenues via short line distances under the $2.71 rate (without the Ex-Parte No. 175 increase) from New York to Youngstown, with similar revenues under the $2.51 rate from Baltimore, shows that the latter would exceed the former. The comparison is shown by the following table:

To Youngstown, Ohio

From:	Rate	Car-Mile Cents	Ton-Mile Mills
Baltimore	$2.51	41.2	6.6
New York	2.71	34.3	5.5

In general, the Commission concluded that the natural advantages to which the Port of Baltimore would ordinarily be entitled were outweighed by the need to maintain ports of entry for iron ore at Philadelphia and New York and that this should be accomplished by diverting traffic from Baltimore to the other ports to such an extent that the facilities already established at Philadelphia may be more extensively and profitably used, and so that New York

would be encouraged to build facilities which it does not now possess.

The weight to be given to the administrative findings of the Commission and the scope of the authority of the reviewing court are well established. The expert judgment of the Commission in respect to matters in the field committed to it by Congress must be recognized and its conclusions, if supported by substantial evidence on the whole record, must be accepted. The Court is not at liberty to substitute its judgment for that of the Commission. As was said in Interstate Commerce Commission v. Union Pacific R. Co., 222 U.S. 541, 547:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I.C.C.*, 206 U.S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Commission is not required to make detailed findings of fact but must make the basis of its decision clear so that the reviewing court may perform its function. The matter was well stated by Judge Magruder in New York Cent. R. Co. v. United States, 99 F. Supp. 394, 400, affirmed, 342 U. S. 890:

> "In Beaumont, S. L. & W. Ry. Co. v. United States, 1930, 282 U.S. 74, 86-87, 51 S. Ct. 1, 75 L. Ed. 221, the Supreme Court, while upholding a Commission order, took occasion to criticize the Commission for the un-

description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 15 (7) of that Act [49 U. S. C. § 15 (7)] provides in part:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice * * *. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *.